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IN THE

# Supreme Court of the United States

October Term, 1941

No. ——

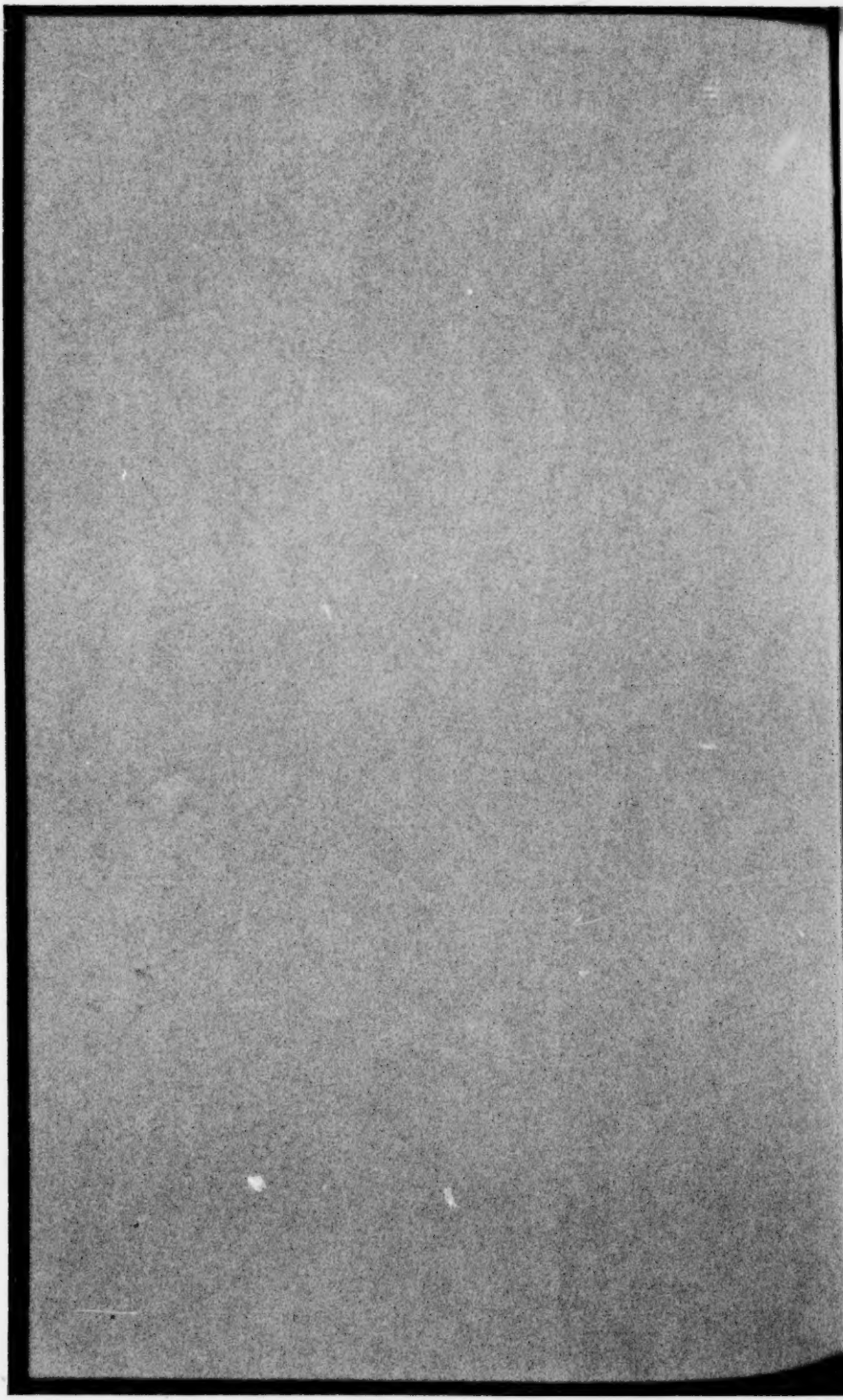
MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPORTING BRIEF



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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

*To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

YOUR PETITIONER, Maryland and Virginia Milk Producers' Association, a cooperative marketing association organized and incorporated under the laws of the State of Maryland, hereinafter referred to as the "Association" prays that a writ of *certiorari* be issued by this court to review the judgment of the United States Court of Appeals for the District

of Columbia, entered in the above entitled cause on April 21st, 1941, affirming in part a prior decision of the Board of Tax Appeals of the District of Columbia of October 9th, 1939, which decision upheld in part certain assessments of additional taxes made August 19th, 1938 against the Association by the District of Columbia, hereinafter called the District, on intangible personal property for the fiscal years 1936, 1937 and 1938, respectively, aggregating $14,159.46 (R. 13, 15, 17) previously paid under protest in writing, but reducing the same by the amount of $2,534.29 (R. 66), and ordering a refund to that extent, but at the same time imposed additional assessments against the Association for the privilege of doing business in the District in the amount of $16,170.86 during the fiscal year 1938 (R. 77), over and above an additional assessment made under a different theory by the District on August 10th, 1938 (R. 14 and 18) in the amount of $818.71 likewise previously paid under protest in writing September 15th, 1938 (R. 19).

## JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 21st, 1941 (R. 168). The jurisdiction of this court is invoked under Section 347, Title 28, U. S. Code, and Section 975 (a), Title 20, Sup. V. of the Code of the District of Columbia, 52 Stats. 371 C. 223, Sec. 8.

## STATUTES INVOLVED.

The statutes involved are as follows: Title 20 of the Code of the District of Columbia, Sects. 752, 753, 754, 757, 758 and 769 authorizing the imposition of taxes on intangibles, and Sections 970 to 970 (15) of Title 6 of the District of Columbia Revenue Act of 1937 D. C. Code 1929 Sup. III, Title 20, authorizing the imposition of Business Privilege taxes by the District, all for the support of that municipality, the pertinent provisions of each of which are set forth in Appendix "A" to this petition.

## OPINIONS BELOW.

Neither the opinion of the United States Court of Appeals for the District of Columbia, concurred in by but two of the three sitting members of that court of six (R. 157) nor the dissenting opinion of Chief Justice Groner, the third member sitting, dissenting in part therefrom, (R. 164) has as yet been reported, nor has the decision of the Board of Tax Appeals for the District of Columbia (R. 72) been reported.

## FACTS.

The facts out of which this case arose are not believed to be in dispute. The differences are as to the deductions to be drawn therefrom; such deductions of the court below are not binding on this Court. *Sweeney* v. *District of Col.*, App. D. C. 113 Fed. 2nd 25. *Jones* v. *Clark*, 172 N. E. 250, 251. They are believed to be as follows:

The Association is a one-member, one vote, non-profit cooperative marketing association, composed only of farmers producing milk for sale at wholesale through the Association, all resident in Maryland, Virginia and West Virginia. It is incorporated under the cooperative marketing association laws of Maryland, Article 23, Section 469, Code of Public General Laws of Maryland, Section 419 of the Maryland Annotated Code, (Appendix "B") and conforms in respect to its organization, its purposes, its relations with its members, and its membership contracts, in all respects to the definitions and requirements as to such associations, authorized to engage in interstate commerce in U. S. Code, Title 7, Section 291; Title 12, Section 1141 and 1141 (f); Title 12, Section 1141 (j), Sup. IV, in respect to the national policy and the right of farmers to organize such associations and to engage in interstate commerce and make the necessary contracts to that end, as well as to Sects. 103 (1) and (12), Title 20, U. S. Code, exempting them from income taxes [Appendix A]. See form of contract (R. 20-29), and By-Laws (R. 30-43). It is without

capital stock and is organized to serve "only" its members (R. 38). It has, with a single exception, hereinafter pointed out, no source of revenue other than a uniform brokerage not exceeding one cent per gallon maximum, to be charged all producing members based on the actual gallons of milk delivered by and marketed for each member, limited, in no event to exceed said one cent per gallon.

## THE GENESIS OF THE REVOLVING FUND.

The contract provides that all expenses of maintaining the Association, including rents, salaries and *reserves* are to be met from this charge, and that any surplus over and above the actual expenditures and reserves are conclusively presumed to be a surplus arising out of the Association's deductions, divided among the members on the basis of the value of the milk delivered by each under said marketing agreement, as a return of the portion of said Association deductions (R. 40 (f)).

By the uniform membership contract (R. 22-29), (paragraph one) (R. 21) each producer "agrees to consign, or have consigned to the Association, or in accordance with its instructions all milk and cream produced" by them severally, on their respective farms. By paragraph two (R. 22) the Association in turn agrees "to sell or dispose of all of the said milk and cream consigned to it or its order, complying with the conditions thereof, to the best advantage in its power * * * and remit the proceeds thereof to the producer less the deductions authorized," subject to the differentials established from time to time under the provisions of pars. three (R. 22) and five (R. 23) thereof, on or about the 15th day of each month all of the purchase money accruing therefrom except the said deductions, with an option authorizing the purchasers of milk to pay the producers direct the proceeds less only the authorized deductions (R. 28-9), on request of the Association. These orders in connection with paragraph 6 (R. 24) recognize the purely agency character of the contract.

Paragraph three of the contract (R. 22) requires the Association to "deduct from the proceeds of all such sales such uniform charges as it makes to other producers * * * necessary to meet its proper proportion of the expenses incurred or to be incurred by the Association, together with such other sums as may be necessary to cover operating expenses * * * of the Association lawfully incurred, as well as to create *reasonable reserves* * * * *reasonably estimated as essential or probably* to be incurred by the Association *pursuant to its constitution and by laws*, provided, however, the total of all *deductions* * * * shall not in the aggregate exceed the rate of one cent per gallon * * * unless such excess be first recommended to the Association by two-thirds majority vote of the Board of Directors and approved by a majority vote of the members of the Association, which authority however the contract also recited had been granted, but limited [See "Note" to the contract (R. 27)] to the creation of an equalization fund, but which authority has never been exercised. All deliveries of milk are made directly by the several producer members at their own expense and risk (R. 111), directly to the purchasing distributors pursuant to contracts made therefor by the Association as their marketing agent.

Up to February 1935 all payments for milk delivered to members under these contracts were always made direct to the producers by the wholesale purchasers thereof under the option aforesaid, less only the one cent brokerage which was paid direct to the Association, as authorized by the orders authorized by par. 6, and appended to each membership contract, and furnished each purchaser, but for reasons of convenience in accounting this method was changed in 1935 (R. 114, 131), since which time the Association has itself collected the entire proceeds of all milk delivered by its members to the purchasers thereof; has deducted its uniform brokerage and remitted the entire net proceeds to its several members in accordance with the terms of the contract, as recited in paragraph five of the contract (R. 24) "to the end that the price received by each producer * * *

shall be substantially uniform with that received by all other producers * * * for milk and/or cream of the same quality produced and marketed at the same time and place under the same circumstances and conditions.

This one cent per gallon brokerage charged each member

> "Is set up to *his* credit and at the end of the year is totaled and given to *his* credit for that particular year, less his proportionate share of the expenses for *that* year; this money called the revolving fund is then invested currently as it is available for investment under the directions of the Board of Directors * * * in securities which are then held in banks in Virginia; most of them * * * in a bank in Richmond, and one in Orange, Virginia, and at the end of each year the interest is added to the revolving fund, and at the end of six years the producer receives back the *unexpended* part of the year's brokerage for the sixth year last preceding in the form of brokerage refund." (R. 87).

The one cent brokerage charge has always been more than sufficient (R. 102) to pay the ordinary day to day, or year to year out-of-pocket expenses of the Association, including the maintenance of "reserves" which all the statutes, state and federal authorize to be maintained as a necessary operating expense. These are essentially contingent and the proper way of distributing this contingent liability among the individual members was accurately solved by providing that such excess brokerage for each year should be retained for cycles of six years each, deemed a sufficient period to insure the ascertainment of all proper charges against the sixth preceding year, and so far as not depleted ad interim by charges properly chargeable to the particular year should be returned to each *individual* member from whom it was retained, whether such individual continued a member or not. This clearly shows that these distributions were not of corporate assets but of individual assets. The contribution having been made on a flat gallonage basis and these records having been preserved the refund was easily and justly made on the same basis without corporate profit or loss of a penny to the Association.

These refunds made directly to members and ex-members "amounted in the last three years respectively to $90,800.00, $109,750.00 and $122,500.00 and were the unexpended part of the brokerage withheld from the members, respectively, in 1930, 1931 and 1932 (R. 87).

These "assets are not the Association's; they are the producer's individual assets" (R. 88). "It would be his—the individual producer's assets in proportion to a participation in the volume of milk delivered to the total volume of milk delivered to the Association" (R. 88). "It is held for the individual" (R. 89). "A record of the amount contributed to the fund during each year by each member, less the expenses for that particular year is kept. * * * We take the total receipts from brokerage during the year, the total expenses, and then at the end of the year we add up that expense, add a percentage of the total receipts and then if there is no depletion of that revolving fund during the next six years, then, of course, he is paid back on that basis" (R. 90).

"It belongs to the members of the Association * * * that is the individual producers. It would be his—the individual producer's assets * * * and that is true regardless of whether or not they both had the same classification. It is held for the individual" (R. 91). "An individual account is kept for each member, kept currently each month, we credit his account and set it up on the card and it is carried right through with the other market information" (R. 100). This is the origin of the so-called "Revolving Fund".

This fund as it existed on July 1, 1935, 1936 and 1937, respectively, consisted of surplus brokerage, accumulated in the years 1929, 1930 and 1931, as added to during the five years following each respective date, and as reduced by the annual disbursements thereof made for the sixth preceding year, and each is clearly a liability and not an asset of the Association. The opinion quotes the auditor's statement that the revolving fund is a statement of the "net" worth of the association, to show it consisted of Association prop-

erty in a legal sense but omits the qualifying and clarifying statement. "The revolving fund is kept so that at any time there would be a complete liquidation, *that amount due the members* would actually balance the revolving fund and nothing left for anybody else" (R. 116).

The Revolving Fund on July 1st, 1935 amounted to $444,007.72 of which $100,500.00 was invested in non-taxable securities, $227,909.94 in corporate bonds and stocks and real estate mortgages on real estate, of which only $19,980.00 were on that day within the District of Columbia. The residue, $115,597.78, was in cash in banks in Maryland, Virginia, and the District of Columbia, of which $33,342.29 was in banks within the District; $6,066.82 was in tangible personal property also returned for taxation and the residue in accounts receivable, of which only $1,639.55 arose from the sale of milk acquired by the Association from others than members (R. 129). The occasional purchase of such milk by the Association from non-members was necessitated from time to time by unforeseen shortages in the production of milk by its members, in order to enable the Association to fulfil commitments previously made to customers (R. 121).

On July 1st, 1936 this Revolving Fund amounted to $526,181.48 (R. 129); of this $4,184.00 was in tangible personal property upon which taxes were paid (R. 16); $145,373.75 in non-taxable securities, leaving only $376,623.03 subject to taxes under any conditions, of which $23,032.50 was in D. C. mortgages and $2,246.87 in district banks, the balance of which was in cash in banks in Maryland and Virginia.

On July 1st, 1937 it amounted to $564,718.99 (R. 56) of which $185,355.95 was invested in non-taxable securities (R. 129), $8,795.00 in tangible personal property upon which taxes had been paid, leaving but $370,068.04 of this fund liable to taxation under any circumstances.

The Board of Tax Appeals adopted these aggregates of the Revolving Fund in the figures stated, but assessed them as if they were all intangibles reduced them only by the

non-taxable intangibles, but failed to reduce them by the amount of tangibles and intangibles previously returned for taxation by the Association, as shown by the original returns. (R. 143 to 155 inclusive).

It was the evident failure of the taxing board in this regard which is responsible for that provision of the sixth paragraph of the majority opinion (R. 164) and the provision in the judgment (R. 168) of the Court of Appeals remanding the cause for further proceedings in conformity with that paragraph (R. 168) but which probably can be settled by stipulation if necessary but which in no event will reduce the judgment of the Court of Appeals by more than $1,000.00.

## ACCOUNTS RECEIVABLE FROM DEALERS.

In addition to taxing the entire Revolving Fund not invested in non-taxable securities the Board of Tax Appeals increased the District assessments on the items designated "Accounts Receivable from dealers" for each of the fiscal years involved as follows:

| | | |
|---|---|---|
| For the fiscal year 1936 | $272,924.24 | (R. 56) |
| For the fiscal year 1937 | 401,918.24 | (R. 56) |
| For the fiscal year 1938 | 479,080.99 | (R. 56) |

(a) Prior to February 1st, 1935 no such items appeared on the Association's books because prior thereto these payments for milk delivered the several distributors by the producers were made direct by the distributors to the several individual producers delivering to them (R. 131).

The amounts accruing to each member-producer for the milk so delivered depended entirely upon the quantity and butterfat content of the milk produced by each several producer, respectively, and the premium accruing to each by reason of the scoring of his individual barn and equipment by the health authorities of the District, and the extent to which his individual deliveries of milk equaled or exceeded his pro-rata share of the fluid milk market as previously as-

certained, and assigned during certain test periods during the months of October, November and December of the preceding year.

When the Association took over the collection and distribution of these proceeds, however, as *del credere* agent for its members "purely an accounting change" (R. 114) it became necessary for the Association to set up accounts on its books with the several distributors showing the quantity, quality and disposition of all milk delivered to them daily respectively by each member in order to know how much to collect from each distributor and how to distribute it to its members (R. 114, 131).

Under the contracts between the *del credere* agent and the several distributors (R. 138), subsequent to 1935, "Payment for all such milk or cream" was made "directly to the Association on or before the 10th day of each month for all milk received by the distributor during the preceding calendar month", and under the membership contract (Sec. 2 [R. 22]) the Association was to pay the several members "the proceeds thereof * * * less the deductions * * * mentioned on or about the 15th day of each month".

The result was that on the first day of July of each year (which is the date at which the taxable value of accounts receivable for the next fiscal year are ascertained) there appeared on the books of the Association in addition to the revolving fund these charges against the several distributors for all milk delivered during the preceding month of June, though not due or collectible by the Association prior to the 10th of July.

These are the balances which the District and the Board of Tax Appeals, and the judgment of the court below, held to be assets of the Association, and taxable as such against it under the theory that under the contracts between the Association, and its several members, the Association was the *purchaser* of all milk produced and delivered by its members, and not merely their marketing agent.

(b) In the same way in ascertaining the Business Privilege Tax for the fiscal year 1938, which was based upon

the gross sales made by the Association in the calendar year 1936, the Board of Tax Appeals based this tax upon the gross sales of milk made by the Association as agent for its members during that calendar year, which the Board of Tax Appeals ascertained to aggregate $4,370,206.63 (R. 71), all of which was milk produced by and delivered by its members, except the small quantities procured from sources other than its members, to fulfil prior committments as aforesaid which aggregated but $39,423.43 (R. 71) less than one per cent, and upon which it assessed a total business privilege tax of $17,326.92 in lieu of the $339.35 paid voluntarily by the Association on December 1st, 1937 on such purchases and $818.71 increase made by the District August 10th, 1938, and paid under protest on September 16th, 1938, netting an additional tax of $16,170.86.

None of these increased assessments on Bills Receivable from Distributors, nor business privilege taxes, were made until after the Association had closed its offices in the District, which it did on June 25th, 1938, and removed its administrative offices to Maryland.

The questions involved and determined by the United States Court of Appeals for the District of Columbia, contrary to the contentions of the petitioner, and here brought in question, are as follows:

*FIRST: The Association is an agency and not a proprietary Association as determined by the Court below, and is organized not for profit but for service to its members at actual cost as contemplated by the cooperative marketing laws of Maryland, Art. 23 Sec. 419 (b) and 441 Maryland Code Ann. and Virginia, Appendix "B", under which it was domesticated therein and which expressly exempted its reserves from taxation by concurrent Legislation, all as contemplated by the Federal Statutes.* (Appendix "A".)

The distinction between profit and non-profit cooperatives, and some consequences thereof, is pointed out by this Court in *Frost* v. *Corporation Commission*, 278 U. S. 515,

523, 72 L. Ed. 483, and adverted to in *U. S.* v. *Rock Royal Corporation*, 307 U. S. 533, 83 L. Ed. 1446, which latter case discusses and justifies the necessity for the differentials provided for in Secs. 3 and 5 of the membership contract. The decision of the Court ignores entirely this distinction and is believed to be contrary to decisions of this court in *Stevens* v. *Baker*, 150 U. S. 312, 316; to decisions of the Circuit Court of Appeals — Circuit in *Edwards Shoe Factory* v. *Stewart*, 107 Fed. 2nd 123, 126, and the Circuit Court of Appeals for the Fourth District in *Eastern Live Stock Corporation* v. *Dickenson*, 107 Fed. (2nd) 116, as well as counter to the great weight of authority, State and Federal, bearing on this point. *Chesterfield* v. *Dehon*, 5 Pick. 7; 16 Am. Dec. 367; *U. S.* v. *Villalonga*, 90 U. S. (23 Wall.) 35, 23 L. Ed. 64, 66; *Larkin* v. *Metcalf*, 202 Fed. 572; 25 C. J. 372; *Davis* v. *Kobe*, 36 Min. 214, 1 Am. St. 663; *Vail* v. *Durrant*, 7 Allan 408; 83 Am. Dec. 695-696.

This question is of great importance not only to the petitioner, but to hundreds, if not thousands of other cooperative marketing associations operating in interstate commerce throughout the United States under similar plans and under the declared policy of the National Agricultural Marketing Act. U. S. Code, Title 12, Sec. 1141, and should be passed upon by this court.

*SECOND: That Congress had no power to impose, or authorize the imposition, for the support of the municipal government of the District of taxes against the Association,*

*(a) On intangibles belonging to its non-resident members and ex-members not located or held in the District of Columbia, but in the temporary custody and control of the Association itself a non-resident without capital or capital stock of any kind, which intangibles came into its possession merely as the marketing agent of its members, all non-residents of the District, and in which assets the Association had no right, title or interest, legal or equitable beyond a right to indemnity therefrom for the actual costs and expenses in-*

*cident to marketing the product of its members, and hereinafter referred to as the "Revolving Fund",*

*(b) Nor on other intangibles likewise collectible by, but not yet collected by the Association as their agent, in which it had no right, title or interest of any kind beyond its duty to collect for its members and remit to them pursuant to the provisions of its charter, the membership contracts between itself and its members, its constitution and by-laws, and hereinafter referred to as "Accounts Receivable from Dealers", both classes of which were the result of transactions in interstate commerce between the Association and its members, both in respect to its organization and its relations to its members, which conforms in all respects to the definitions and requirements of such associations authorized to engage in interstate commerce as set out in U. S. Code, Title 7, Section 291; Title 12, Sections 1141, 1141(f) and 1141(j), Sup. V, in respect to the rights of farmers to organize such associations, and to engage in interstate commerce and make the necessary contracts to that end, as well as to Section 103 (I) and (12) Title 20 U. S. Code* [*See Appendix "A" hereto*].

The decision of the court below is believed to be contrary to the Fifth Amendment to the Constitution of the United States prohibiting the taking of property for public use without just compensation, and without due process of law, and of Section 8 of Article 1 of the Constitution which requires all duties, imposts and excises shall be uniform throughout the United States, prohibits direct taxation except in proportion to the census and any tax or duty on articles exported from any state and any preference by any regulation of Congress to the ports of one state over those of another (R. 11).

These questions have never been directly passed on by this court, though in some aspects they were presented to this court in *Cohens* v. *Va.*, 6 Wheat 245, 5 L. Ed. 257, which point this court at that time avoided by holding that it was not the intent of Congress in passing the law there in ques-

tion that it should be operative beyond the limits of the District. They were again presented and again passed over on the same ground in *Stoutenburg* v. *Hennick*, 129 U. S. 637, 32 L. Ed. 141, on the same course of reasoning.

The District Court of Appeals in *Beistzell* v. *District of Columbia*, 21 App. D. C. 49, arrived at the same result by the same course of reasoning, which, however, the majority found necessary to disregard in *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246, reiterated by the majority decision in this case (R. 164).

*THIRD: Assuming that Congress has such power it was not the intent of Congress to impose such taxes on the Revolving Fund by the enactment of Sections 752, 753, 754, 757, 758, 769, Title 20 of the D. C. Code, 1929.*

The decision of the Court of Appeals that it was the intent of Congress to impose these taxes on funds belonging to non-residents arising in interstate commerce, and to impose a business privilege tax on transactions in interstate commerce are believed to be contrary to the decisions of this court in *Cohens* v. *Va.*, 6 Wheat 245; 5 L. Ed. 257, and *Stoutenburg* v. *Hennick*, 129 U. S. 637; 32 L. Ed. 141, and of the Court of Appeals of the District itself in *Beistzell* v. *District of Columbia, supra.*

*FOURTH: The Association was not carrying on or exercising any business for gain or economic benefit to itself in its corporate identity and therefore was not subject to the Business Privilege Tax within the meaning of Section I Title VI of the District of Columbia Revenue Act of 1937 D. C. Code, Sup III, Section 970 par (d) and was not taxable upon the funds of its principal, of which it was a mere conduit, idem, D. C. Code, Sup III, 970 (d).*

The decision of the Court below in this respect is believed to be plainly contrary to the provisions of the law of the District under which it is claimed to be imposed, and to the great weight of authority State and Federal and contrary to the 5th Amendment.

*FIFTH: Assuming that Congress did possess power to impose such taxes on the "Accounts Receivable from Dealers" Congress did not by the enactment of the District of Columbia Revenue Act of 1937, Title 20 D. C. Code, Sup III, Sections 970 to 970 (14) intend to impose such taxes on such non-resident corporations so engaged in interstate commerce.*

The decision of the Court to the contrary is believed to be contrary to the same decisions cited under the third point, *supra.*

*SIXTH: Assuming that Congress did possess such powers to impose such burdens on interstate commerce under the provisions of the District Revenue Act of 1937 the measure of such taxes should have been based not on the gross proceeds of such sales, but on the amount of the commissions or brokerage retainable by the Association from the proceeds of such sales when collected.*

Revenue Act for 1937 District Code, Title 20, Section 970 (e) Sup III, expressly provided "The terms gross receipts when used in connection with, or in respect of financial transactions, or in respect of * * * collection of money * * * shall be deemed to mean the gross * * * commission or other gross income earned provided further that in connection with commission merchants, attorneys, or other agents the term "gross receipts" shall be deemed to mean the gross amount of such commission or gross fees deceived by them".

*SEVENTH: The Association having made, within the time and in the manner required by law, return of all tangible and intangible property deemed by it liable to taxation within the District for each of the fiscal years 1936, 1937 and 1938, and these returns having been accepted by the proper authorities of the District and taxes assessed thereon by it in accordance with such return, and with law, and the same having been regularly paid before*

*maturity in due course in each instance the District was without power, after the expiration of the respective fiscal years for which such taxes were assessable, to assess other and additional taxes on its intangibles without notice or demand.*

It is practically admitted that under the original provisions of the District of Columbia Revenue Act that all of these assessments made after the expiration of the fiscal year for which they were assessed were void under the ruling of the United States Court of Appeals for the District of Columbia in *Tumulty* v. *District*, 69 App. D. C. 254; 102 Fed. 2nd 716, and *Hunt* v. *The District of Columbia*, 70 App. D. C. 10. The assessment here, however, is sought to be upheld under its supposed amendment by the District of Columbia Revenue Act of 1937, to which both the Board of Tax Appeals and the Court below gave a retroactive effect, contrary, it is submitted, to the great weight of authority on this subject, and contrary to the opinion of the court of Appeals itself. *Neild* v. *District of Columbia*, 71 App. D. C. 306; 110 Fed. 2nd, 246; *Cox* v. *Hart*, 260 U. S. 427; 434; *Big Diamond Mills Co.* v. *U. S.*, 8 Cir. 51 Fed. (2nd) 721; *Anderson* v. *Ritterbush*, 22 Okla 761; 98 Pac. 1002.

The conclusion of the court below is based on *Sturgis* v. *Carter*, 114 U. S. 511, 517, 518. In that case this court but followed the interpretation placed by the Ohio Court upon an Ohio Statute in respect to omitted taxes levied by and due a sovereign.

The taxes here in question are not state taxes against which no limitation can run, but that of a mere municipality against which the limitations do run. *Met. R. R. Co.* v. *District of Col.*, 132 U. S. 1, 7; 32 L. Ed. 231, 234; *Dollar Savings Bank* v. *U. S.*, (19 Wall 227); 22 L. Ed. 80, 82.

It is clear that without legislative authority the District could levy none of these taxes. This was given by Sec. 769, Title 20. But where the same law that grants a right prescribes the time place and manner in which the right is to

be exercised, the method prescribed is exclusive. *Dollar Bank* v. *U. S.*, 19 Wall 227, and if not exercised within the time prescribed it is dead. This is the reason back of *Tumulty* v. *D. C.*, and *Hunt* v. *District of Columbia, supra*, and the basis upon which these attempts were held void and not merely voidable. "When a judgment is declared void, the possibilities of language have been exhausted." *Bray* v. *Landergren*, 161 Va. 713. There is no word or line in either act repealing Sec. 769 or purporting to amend it, nor any expression of a purpose to give it a retroactive operation or to revive a dead right. *Neild* v. *District of Col.*, 71 D. C. App. 306; 110 Fed. 2nd, 246 and cases there cited. *Anderson* v. *Ritterbush*, 22 Okla. 761, 788, and cases there cited. On the contrary the amendment adds penalties not previously existing and as construed constitutes an *ex post facto* law.

*EIGHTH: The Association having in compliance with the provisions of the Business Privilege Tax made full report and return of all of its receipts from business conducted within the District of Columbia during the calendar year 1936 as a basis for any business privilege tax arising thereunder, and the District having accepted said return with full knowledge of the facts as disclosed thereby (R. 133-136) and having assessed the taxes accruing thereunder and these having been paid and accepted in due course the District thereafter had no power to assess other and additional business privilege taxes thereon.*

The same principles are applicable to this point as those just cited in respect to point seven.

The decision here presented for review it is respectfully submitted is plainly contrary to decisions of this court; to the plain provisions of the statutes under which the taxes are levied and are of great interest to all cooperative marketing associations throughout the United States operating under an agency as distinguished from a proprietary basis, and involve important questions of Federal law which have not been but which should be settled by this court.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisional powers and that the writ of certiorari prayed for should be awarded, and that this case be brought to this court and there reviewed and reversed, as if it had been brought there by unrestricted writ of error or appeal as provided by Section 347 Title 28 U. S. Code and Sec. 975(a) District Code Title 20, Sup. V. 52 Stats. 371 C. 223, Sec. 8, and that such judgment may be entered by this court as should have been entered by the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

JOHN S. BARBOUR,
*Attorney for Petitioner.*

C. B. GARNETT,
*Of Counsel.*

IN THE

# Supreme Court of the United States

October Term, 1941.

No. ——

Maryland and Virginia Milk Producers' Association, Inc., *Petitioner,*

v.

District of Columbia, *Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### OPINIONS BELOW, JURISDICTION, THE STATEMENT OF THE CASE AND POINTS RELIED ON.

Reference is made to the foregoing petition for the statement of the opinions below, grounds of jurisdiction, statement of the case and points relied on.

### ARGUMENT.

*POINT ONE. The Association is an agency and not a proprietary Association.*

The conclusion to the contrary of the court below, and which is the cause of most, if not all, of the erroneous conclusions complained of is apparently based upon the case of *People* v. *Shoemaker*, 239 N. Y. Sup. 71 (R. 162).

As pointed out by Chief Justice Groner in his dissenting opinion (R. 166) that case is not in point. The point here involved was not involved in that case, as it was agreed in that case by all parties that the cooperative there in question was a proprietary corporation, which bought all milk directly from its members as well as from other producers, received it from the producers, and after commingling sold it for its own account to the distributor, whereas, in the case at bar no such facts or concessions exist—the contrary is shown by the uncontradicted evidence.

The Association here did not buy any milk from its members but as their agent sold it to the distributors. The member-producers delivered it directly to the distributors and authorized in writing, pursuant to their agents' contracts the distributors to pay therefor directly to their *del credere* agent.

Nothing further need be said on this point in addition to the petition than to refer the court to the very able and unanswerable argument on this point of Mr. Chief Justice Groner (R. 166-167), which is adopted as a part of this brief along with the authorities there cited and those cited in the petition.

*POINT TWO (a) Congress is without power to impose taxes for the support of the municipal government on property having no situs therein; (b) On intangibles—not the property of the Association.*

The Court below based its conclusion that the intangibles constituting the Revolving Fund are taxable by the District on *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 211, upon the theory that the association had established a commercial domicile in the District of Columbia.

That case is not in point because the corporation there, unlike the Association here, was a proprietary corporation; there was no question as to the ownership of the assets involved. In fact, under the law of its incorporation it was turned loose on the world to secure a commercial domicile

at any place and anywhere it could, not contrary to the laws of the place so selected, as it was not required to hold any of its meetings within the limits of the state, which had incorporated it, or to transact any of its business therein, whereas, the Association is a mere agency corporation with no capital and no capital stock, and no *corporate powers* under which it could earn or accumulate property, beyond its operating expense. Under the law of its creation it was compelled to hold all of its general meetings in the state of Maryland, was in a large sense governed by its local units organized in the different states, whose meetings were all required to be held within those states, and none of such units ever met, or were permitted to meet, within the District, even though the Association did maintain an administrative office within the District, but therein was engaged purely in interstate commerce. The statement in the opinion that the Association had a discretion as to *when* it might return to the members the excess brokerage detained from them, and devote it to general corporate purposes is without point when we see that it had no corporate powers or purposes other than to sell the milk at cost including the maintenance of reserves "reasonably calculated as probably to be incurred" and return all excess to the individuals from whom such excess had been withheld. Under the plan adopted this result was attained to the penny.

The question of the power of a state, or any sovereign to tax property depends upon a taxable situs of such property, or of the persons of the owner of such property, within its territorial limits.

The Court below in this ruling seems to have followed its own conclusion in *Neild* v. *District of Columbia*, 71 App. D. C. 306; 110 Fed. (2nd) 246, and *Colgate Palm Olive, etc.* v. *District*, App. D. C. LXVII W. L. R. 242, which involved the power of the Federal Government to impose an excise tax on one transacting business in both interstate and intrastate commerce within the District, based on gross sales of its own property arising within the District, which

is quite distinct from the question here involved and more akin to the still later decisions of this court in *Sweeney* v. *District*, App. D. C. , 113 Fed. (2nd) 25.

The earlier cases on this subject are *Foreign Bond Holders Case*, 15 Wall. 300, 21 L. Ed. 171, 179; *New Orleans* v. *Stemple*, 175 U. S. 309; 44 L. Ed. 175, and *Liverpoole L. & G.* v. *Board of Assessors*, 221 U. S. 346; 55 L. Ed. 767.

The principles derived from those cases upon which the intangibles of a non-domiciled foreign corporation could be taxed may be summarized as follows:

First: An origin in a local business being then conducted within the limits of the State.

Second: That the capital so used was the capital of the foreigner taxed.

Third: That the credit taxed in fact had its origin in intrastate transaction, and was continued therein as a part of the local business being then conducted for permanent and continued use therein in that local business, and was so held as incident to or an instrumentality for the continued operation therein of that localized business.

That the interpretation placed on these leading cases is one long afterwards put on them by this court itself is shown by its opinion in *Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371, itself another leading case, saying:

> "New Orleans v. Stempel, 175 U. S. 309; 44 L. Ed. 174; Bristol v. Washington County, 177 U. S. 13, 44 L. Ed. 701; and Liverpool, London and Globe Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business.

*Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1141 is distinguished in its facts from the case at bar in the following respects at least: All of its corporate activities, intracorporate as well as with third persons were per-

formed outside of its state of origin. The intangibles there taxed were merely accounts receivable and bank deposits incident to business conducted in the taxing state. They were all held by the corporation in its proprietary capacity and not as an agent for others. The State court held that the words there used in imposing the tax only on property "liable for taxation" [the same words used in Sec. 753, of the District Tax Law] did not indicate a purpose to tax intangibles which were primarily subject to taxation in another jurisdiction. This court in reviewing its former decision was careful to point out the basis of those decisions, where at page 211, after citing many of the above cases said:

> "These cases, we said in Farmers Loan and T. Co. v. Minnesota supra (280 U. S. p. 213, 74 L. Ed. 375; 50 S. Ct. 98; 65 A. L. R. 1000) 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some *local* business' ".

To hold the intangibles held by the association were taxable to it by the District would violate not only the Fifth Amendment to the Constitution of the United States, but if sought to be sustained by reason of the control of Congress over interstate commerce, under Article 1, Sec. 8, Clause 3 of the Constitution and the power of exclusive legislation for the District, under clause 17 of that Article, it is submitted that such powers must be exercised, subject to the limitations of Sec. 9 of the same Article denying to Congress power to lay a tax or duty on articles exported from any state, or to give by any regulation of commerce or revenue, preference to the ports of one state over another.

While the right of exclusive legislation for the District does exclude the power of any state to legislate for the District it does not empower the Congress in the exercise of this power to do so without regard to the other limitations whether express or implied, arising from the spirit as well as the words of the Constitution, which would be the effect of recognizing in Congress a power in regulating commerce

between the District and states to discriminate against the states, in a manner that neither it nor any state could reciprocate or meet in respect to commerce between it and the District.

Under this construction a producer of milk, or a manufacturer or wholesale merchant doing business in the District of Columbia could be permitted to engage in interstate commerce in all or any of the other states without the imposition of any tax or burden of any kind by a state, whether on property or as an excise tax whereas under *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; 30 L. Ed. 694, and *Asher* v. *Texas*, 128 U. S. 120, 368, no such producer, manufacturer or merchant in such state could be permitted to engage in interstate commerce in the District of Columbia without being subject to both property and excise taxes.

In *Adams Mfg. Co.* v. *Stoven*, 304 U. S. 307, 82 L. Ed. 1365 this court denied the power of the State of Indiana to tax even an Indiana corporation on its sales in either interstate or intrastate business, merely because the two characters of commerce were not distinguished in the taxing act, one of which if intrastate they could tax, and the other if interstate they could not tax.

The exclusive power of legislation for the District, reposed in Congress by the Constitution is not synonymous with an "unrestricted" power of legislation especially in a document, a main purpose of which was to place restriction on legislative and executive powers of both the federal and state governments, and more especially in respect to commerce between states and localities. It is hard for one with information as to the real evils sought to be cured by the Constitution to believe that the framers of that instrument intended by the adoption of Clause 17 of Section 8, Article 1, to annul *quo ad* the District the limitations placed on Congress by Clause 9 of the same article.

*POINT THREE. Congress did not intend to impose such taxes on the Revolving Fund.*

The principles underlying the question were before this Court in *Cohens* v. *Virginia*, 6 Wheat. 245, 5 L. Ed. 257; *Stoutenburg* v. *Hennick*, 129 U. S. 637; 32 L. Ed. 141; and before the Court of Appeals of the District in *Beistzell* v. *District of Columbia*, 21 App. D. C. 49.

In *Cohens* v. *Virginia*, 6 Wheat. 245, 5 L. Ed. 256, this court said:

> "* * * we find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised within the city. The subject on which Congress was employed when framing this act was a local subject; the formation of a separate body for the management of the internal affairs of the city * * * Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects *solely*. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the city alone, to the action of the being they were creating within the city, and not to any extraterritorial operations. In describing the powers of such a being, no words of limitation need be used. *They are limited by the subject.* But if it be intended to give its act a binding efficacy *beyond the natural limits of its power*, and within the jurisdiction of a *distinct power*, we should expect to find in the language of the incorporating act some words indicating such intention.
>
> Without such words, we cannot suppose that Congress designed to give to the acts of the corporation any other effect, beyond its limits, than attends every act, having the sanction of local law, when anything depends upon it which is to be transacted elsewhere * * *. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose that the President's house, the Capitol, the Navy Yard, or other public institution was to be benefited * * * or was to form a charge on the city revenue. Coming in aid of the city

revenue they are of the same character with it; the mere creature of a corporate power." (Italics supplied)

In *Beistzell* v. *District of Columbia,* 21 App. D. C. 49, passing on a similar question the Court of Appeals of the District said:

> "The act in question was not intended to regulate, in any sense, the commercial intercourse of the Union. It is purely a local act, and intended to have local operation only. In other words, the particular provision of the statute in question was intended as a regulation of a purely municipal character, and that is made clear, as was said in Stoutenburg v. Hennick, upon the principle of *noscitur a sociis,* if the clause be taken as it should be, in connection with the other clauses and parts of the act relating to licenses. At any rate, it would seem to be reasonable to presume that if it had been the intention of Congress to make the provision of the act apply to soliciting agents *for the owners of goods beyond the district,* that intention would have been expressly declared, and not left to doubtful construction."

And in *Stoutenburg* v. *Hennick,* 129 U. S. 637; 32 L. Ed. 141, this court said:

> "Congress has express power to 'exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing over the District of Columbia the combined powers of a general and of a state Government in all cases where legislation is possible. But as the repository of the legislative power of the United States congress in creating the District of Columbia 'a body corporate for municipal purposes' *could* only authorize it to exercise *municipal powers; and this is all that Congress attempted to do.*
>
> "The Act of the Legislative Assembly under * * * as stated in its title 'a license on trades, business and professions practiced or carried on in the District of Columbia, and required by Clause 3 of Section 21 among other persons in trade, commercial agents * * * to take out and pay for such license. This provision

was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious upon the principle of *noscitur a sociis* if the clause be taken as it should be in connection with the other clauses and parts of the Acts. But it is indistinguishable from that held void in Robbins v. Shelby County Taxing District, 120 U. S. 489; 30 L. Ed. 694 and Asher v. Texas, 128 U. S. 120, as being a regulation of interstate commerce.

"It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question *solely for the District of Columbia*, because whether Congress acts upon the subject the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point." (Italics supplied.)

The marked distinction between Acts of Congress local to the District, and those general in their application, was recognized and enforced in *American Security and Trust Company* v. *District*, 50 App. D. C. 231 and 224 U. S. 491; 56 L. Ed. 856, where both courts held that the provisions of Section 250 of the Judicial Code as it then read, giving this court jurisdiction were not applicable to local statutes and spoke of it as a

"well known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress".

*POINT FOUR: THE ASSOCIATION WAS NOT CARRYING ON ANY BUSINESS FOR GAIN OR ECONOMIC PROFIT.*

The decisions of the court below in this respect are so plainly contrary to the provisions of the law under which it is claimed to be imposed, as to make any further argument on this point unnecessary.

In view of a possible suggestion that because the Association derived a possible profit from the milk it purchased incidentally from others than its members it thereby be-

came a corporation operating for profit and therefore liable to taxation on its gross receipts, what was said by the Federal Board of Tax Appeals in *Eugene Fruit Growers Association* v. *Com'r of Internal Revenue*, 37 B. T. A. 963 is peculiarly applicable here.

The Commissioner there had determined a deficiency in income tax for 1933, based upon the alleged taxability of two items, one of $3,062.28 retained that year out of the so-called "1930 carrot pool" and credited to the building fund reserve, the other item $5,945.10 deductions from the proceeds of other pools which were used for the payment of a 3 per cent dividend on its stock being—unlike the petitioner—a stock cooperative. The Board of Tax Appeals reversing the Commissioner then said:

> "In addition to the processing and marketing of members' products on a non-profit basis, petitioner also conducts 'commercial departments' * * * engaged in other activities * * * a refrigeration plant selling ice and ice cream * * * a machine shop * * * manufacture vinegar, and certain specialities * * *. Besides this, they take over the producers' 'pools' inventories of canned and processed products which have not been disposed of at the end of a reasonable period 'paying' for these items on an estimated fair market basis and thus permitted the more expeditious liquidation of the pools themselves. The products so acquired are disposed of by this department as occasion permits.
>
> The last item is by far the largest in dollar volume. It accounts for $102,409.61, out of total gross sales of all the 'commercial departments' of $236,572.42. It may be questioned whether this item is essentially different from the sales made out of the pools themselves * * *. Though referred to as a 'sale' by the pools, the transfer to the 'commercial department' is nothing so imposing since title to the products is in the association from the beginning. The distinction principally one of bookkeeping * * *. Products not so disposed of and taken over to be sold by the 'commercial department' return a payment to the producers immediately, but this is an estimate of what they would have brought had they been sold from the pool, namely, estimated market price less estimated cost of marketing. Only if

these estimates prove erroneous can there be any profit. And this 'profit' even if it results, is not essentially different from the dividends paid out of pool operations. It goes almost entirely to the producer-members in any event, though not as participants in the operation of the pools but as stockholders. This single factor, however, can not be sufficient to condemn petitioner's plan of operation since the payment of dividends up to 8% is expressly permitted by the Revenue Act, and petitioner is not authorized to exceed this figure. *Petitioner's practice appears to be an appropriate method of solving one of its operating problems and we should be reluctant to conclude that it would thereby become disqualified for exemption.*

The Association here does not take title to its members' produce as it did there, has no stock and no means of accumulating capital. It does business as agents for its members only, and that at actual cost. The refunds are to the individuals from whom they were individually retained, and not to the corporate membership *pro tem*. As already stated it paid voluntarily an income tax upon all of these so-called commercial transactions. Concerning such the Board of Tax Appeals said further:

"It seems to us that all of the activities mentioned originated and were continuously maintained as incidents to the association's principal function, cooperative marketing for agricultural producers. They were, according to the uncontroverted evidence, designed—to assist in the efficient performance of that function by facilitating the marketing of products, on the one hand, and by reducing the cost of necessary operations on the other. The encouragement extended to such enterprises by the favorable provisions of the revenue acts would to say the least be anomalous if the sacrifice of efficient operations were to be required in order to attain the statutory exemption. We find no justification for such a construction of the law or of the regulations."

"Looked upon as a whole it seems to us that these 'commercial departments' were purely incidental to petitioner's principal purpose. They were conducted, not for their own sake, but as an adjunct and supple-

> ment to the cooperative marketing of farm products. See Producers' Produce Co. v. Crooks, 2 Fed. Sup. 969, This seems to us to be the test, and not the numerical percentage of petitioner's business attributable to those branches. It may be that the proportion of business done, could be so great that it would be unreal to consider such operations incidental. Hills Mercantile Co., 22 B. T. A. 114. On this point we express no opinion, since in our view no such contention could prevail on the facts before us."

That decision goes far beyond anything that is claimed by the petitioner, or that is necessary to sustain the non-taxable character of the funds involved.

*POINT FIVE: Congress did not intend to impose taxes on "Accounts Receivable from Dealers".*

The authorities cited under point three, *supra*, would seem to be conclusive on this point.

*POINT SIX: CONGRESS WAS WITHOUT POWER TO IMPOSE AN EXCISE TAX FOR THE SUPPORT OF THE MUNICIPAL GOVERNMENT OF THE DISTRICT.*

Mr. Justice Groner in his dissenting opinion (R. 167), after citing Section 975, Title 20, D. C. Code, Sup. III in force at the time, as follows:

> "'Provided, however, that the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit"

continued:

> "in which it is expressly provided that the license tax shall be computed and be payable only, in the case of a broker or agent, upon gross commissions and shall not be taxable or payable upon funds of the principal of which the agent is a mere conduit. Here, if I am correct, the milk never having belonged to petitioner, its

sale by petitioner with the obligation to pay the proceeds to the producer made it a 'mere conduit' as to the sum so transmitted by it.' ".

That the court below erred in using the gross collections as the base for the tax instead of the commissions realized is too obvious to justify further argument on this point.

*POINT SEVEN: The District having assessed taxes against the Association for the fiscal years 1936, 1937 and 1938 was without power to alter these assessments after the expiration of the several fiscal years.*

It is thought that any discussion of this point additional to that contained in the petition is unnecessary, further than to call attention to the fact that though the "majority opinion" (R. 158) states "We need not consider this question, because it was not raised before the board, but we are free to do so" is inaccurate in that under *Hormell* v. *Helvering*, decided March 17th, 1941, L. Ed. Adv. Ops. 56, required such consideration, and that the intimation implicit in the quotation by the court in its opinion from *Sturgess* v. *Carter*, 114 U. S. 511, 517, 20 L. Ed. 240, that a tax payer had no "vested right in the fruits of his false return", that the existence of the Revolving Fund, its character, or amount was unknown to or concealed from the taxing authorities of the District is not justified inasmuch as the records of this court, and of the court of appeals itself, showed that the question of the taxation of this Revolving Fund, its origin, its purpose and amounts for previous years were well known to the taxing authorities, and was the subject of litigation between the Association and the District. See *Maryland and Virginia Milk Producers' Association* v. *Hazen et als.* No. 6614, 66 App. D. C. 136, 85 Fed. 2nd 302; 200 U. S. 561; 81 L. Ed. 417 in which at the instance of the District the Association filed under oath detailed statements showing its existence and its entire amount, and also to call attention to the fact that though Chief Justice Groner's opinion purports to be a dissent in *part* only—that in the concluding paragraph of his opinion he states:

> "I have not discussed the question whether petitioner's stocks and bonds, comprising its "revolving fund" are taxable, but considering the petitioner is a Maryland corporation and its stocks and bonds were always outside the District of Columbia, and on my theory of the case were the property of the individual member-farmers and not petitioner, I have grave doubts whether any of these securities ever had a taxable situs in the District". (R. 167.)

In view of the cardinal rule of tax construction "that all reasonable doubts as to the construction and intent of tax statutes are to be determined in favor of the tax-payer" we feel justified in saying that Mr. Chief Justice Groner in fact gave his affirmative assent to no important conclusion of the judgment complained of. *Gould* v. *Gould*, 245 U. S. 151, 62 L. Ed. 211; *White* v. *Aronson*, 302 U. S. 16, 82 L. Ed. 20, 23; *Hassitt* v. *Welch*, 303 U. S. 314, 82 L. Ed. 858, 867.

In such case to "seriously doubt is to damn".

*POINT EIGHT: THE DISTRICT HAVING ASSESSED THE ASSOCIATION WITH A BUSINESS PRIVILEGE TAX ON ITS RETURNS, WHICH SHOWED ALL THE ESSENTIAL FACTS, WAS WITHOUT POWER TO RE-ASSESS IT WITH FURTHER TAXES AFTER THE EXPIRTION OF THE FISCAL YEAR AND AFTER THE ASSOCIATION HAD REMOVED FROM THE DISTRICT.*

The same principles discussed under the preceding point are equally applicable to this point.

It is respectfully submitted that the petition for certiorari should be granted, and on hearing the judgment of the court below should be reversed.

Respectfully submitted,

JOHN S. BARBOUR,
*Attorney for Petitioner.*

CHRISTOPHER B. GARNETT,
*Of Counsel.*

July .., 1941.

## APPENDIX "A".

### Statutes Involved.

Title 20 of the Code of the District of Columbia, as follows:

"Section 752. All personal property in the District * * * subject to taxation to be listed and assessed at not less than the full and true value thereof in lawful money."

"Section 753. The assessor of the District * * * shall annually cause to be prepared a printed blank schedule of all tangible personal property * * * subject to taxation * * *, and a copy of said schedule shall be delivered to any citizen applying therefor. Every person * * * in said District liable to taxation hereunder and every association, company, executor * * * holding personal property in trust liable to taxation hereunder shall * * * fill out the proper blanks * * * and make and sign an affidavit to the truth thereof * * * and THEREUPON said board of personal tax appraisers, or any one of the members * * * shall assess said property at its fair cash value, and enter the same * * * upon said blanks * * * and the amount thus ascertained shall be entered upon the books for taxation for each fiscal year * * *. Provided, that if any person * * * shall fail to make and deliver * * * within thirty days * * * the schedule of his or its said personal property * * * then the said board * * * shall without delay, from the best information they can procure, make an assessment against such person * * * to which they shall add twenty percentum thereof * * *. Provided further that if the said board of personal tax appraisers be not satisfied as to the correctness of the return * * * of personal property * * * said board may reject said return and * * * may from the best information he or they can procure * * * assess the same in such amount as may seem just; and notice of the rejection of the sworn return shall be given to the party interested * * *".

"Section 754. The moneys and credits of any person * * * shall be scheduled and appraised in the manner provided by Sec. 753 * * * and as taxes on said moneys and credits there shall be paid to the said tax collector

* * * not less than five tenths of 1 percentum of the value thereof."

"Section 757. Returns of all personal property * * * shall be made in the month of July in the fiscal year in which the assessment is levied and the value of such property shall be made as of the first day of that month * * *. Provided, that this section shall be effective during March 1929 * * *".

"Section 758 * * *

"If any person neglects * * * to file a return of personal property as required by law * * * the Board of Commissioners may, by petition to the Supreme Court of the District * * * compel the filing of a sworn return * * *".

"Section 769. * * * If at any time within any current year, property subject to taxation under the provisions of this section shall have been omitted from assessment, said board of personal tax appraisers shall immediately proceed to assess the same for the then current year, giving notice in writing to the persons or corporations so assessed, who shall have a right of appeal within ten days from date of said notice * * *".

District of Columbia Revenue Act, 1937, Title 20 D. C. Code, Sup. III, Sections 970 to 970 (15):

"Section 970(1)(d) The term 'business' shall include the carrying on * * * for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property, and in or on property owned by the United States, not including, however * * * any individual as an employee for wages, salary or commission".

"970 (2) (a) No person shall engage in or carry on any business in the District of Columbia * * * without having first obtained a license so to do from the Commissioners".

"Section 970 (4) Every person subject to the tax hereunder, shall, within thirty days after the approval of this Act, furnish to the assessor on a form prescribed * * * a statement under oath showing the gross receipts

of the taxpayer during the preceding calendar year, which said return shall contain such other information as the Commissioners may deem necessary * * *.

"The Commissioners are authorized and empowered to extend for cause shown the time for filing a return for a period not exceeding thirty days."

"Section 970 (5) For the privilege of engaging in business in the District of Columbia each person * * * for the fiscal year 1937-1938 shall pay a tax equal to two-fifths of 1 percentum of the gross receipts in excess of $2,000.00 derived from such business for the calendar year 1936; Provided * * * that the tax * * * shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

"Section 970 (8) If a return * * * is insufficient and the maker fails to file a * * * sufficient return within 20 days * * * required by notice * * * the assessor shall determine the amount of the tax * * *. The assessor shall give notice of such determination to the person liable, and such determination shall finally and irrevocably fix the tax unless the person * * * within fifteen days apply to the Board of Equalization and review * * *".

"Section 970 (9) Any person failing to file a return or corrected return within the time required by this title shall be subject to a penalty of 10 percentum of the tax due plus 5 percentum of such tax for each month of delay or fraction thereof."

"Section 970 (11) The taxes levied hereunder and penalties may be collected by the collector of taxes of the District of Columbia in the manner provided by law for the collection of taxes due the District of Columbia on personal property in force at the time of such collection."

National Agricultural Marketing Act, U. S. Code, Title 12, Section 1141:

"To promote the effective merchandising of agricultural commodities in interstate and foreign commerce,

so that the industry of agriculture will be placed on a basis of economic equality with other industries, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—

"(1) by minimizing speculation.

"(2) by preventing inefficient and wasteful methods of distribution.

"(3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."

U. S. Code, Title 12, Sec. 1141 (j):

"Section 1141 (j) As used in this subchapter the term 'cooperative association' means any association in which farmers act together in collectively processing, preparing for market, handling and/or marketing the farm products, of persons so engaged and also means any association in which farmers act together in collectively purchasing, testing, grading and/or processing their farm supplies; Provided, however, that such associations are operated—for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

"First: That no member * * * is allowed more than one vote * * *.

"Second: That the Association does not pay dividends on stock or membership capital in excess of 8 percentum per annum."

U. S. Code, Title 12, Sec. 1141 (j) Supp. IV.

"Section (a) * * * As used in this subchapter the term 'cooperative association' means any association in which farmers act together * * * handling and/or marketing the farm products of persons so engaged, and * * * in which farmers act together in * * * grading * * * distributing and/or furnishing farm supplies, and/or farm business services; Provided, however, that such associations are operated for the mutual benefit of

the members thereof as such producers and purchasers and conform to one or both of the following requirements:

"First: That no member of the association is allowed more than one vote * * * and

"Second: That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

"And in any case to the following:

"Third: That the association shall not deal in farm products, farm supplies and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members * * *".

U. S. Code, Title 7, Section 291:

"* * * Persons engaged in the production of agricultural products * * * may act together in associations, corporate or otherwise, with or without capital stock, in collectively * * * handling and marketing in interstate and foreign commerce, such products * * * and such associations and their members may make the necessary contracts and agreements to effect such purposes; Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First: That no member of the association is allowed more than one vote * * *

"Second: That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

"And in any case to the following:

"Third: That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members".

## APPENDIX "B".

Article 23, Section 419 Ann. Code of Maryland:

"Section 419. The following terms whenever used in this Act, shall be construed as follows:

"(a) 'Members' shall mean one who owns stock in a corporation or association organized with capital stock or one who holds a certificate of membership in a corporation or an association organized without capital stock.

"(b) 'Cooperative' as applied to corporations or associations, shall mean that the following principles are adopted and used by such corporations or associations:

"That such associations are operated for the mutual benefit of the members * * * and conform to the following requirements:

"First: That no member * * * is allowed more than one vote * * *.

"Second: That the Association does not pay dividends on stock or membership capital in excess of eight percent per annum.

"Third: That the Association shall not deal in products of non-members to an amount greater in value than such as are handled by it for members.

"Fourth: Proceeds from the business of such Association after paying of any necessary expenses and authorized deductions are distributed to the members in proportion to the volume of business transacted by said members with the Association".

"Section 441: Any association organized under this act as agent to sell the products of members, may operate upon a non-profit basis by contracting to pay the members, for products sold by said members to or through the association, the resale price minus a uniform charge to cover the expenses involved * * *; resale price to be the actual resale price, or to be based upon the average price during any period for products of the same type and quality; the uniform charge for expense to be specified in the contract or made otherwise ascertainable or left for determination by the directors."

Virginia Code, Section 1265 (3):

"Five or more persons engaged in the production of agricultural products may form a non-profit cooperative association, with or without capital stock, under the provisions of this Act."

Section 1265 (20)

"* * * (a) Agricultural producers and cooperative corporations, organized in other states under the laws similar to this act, shall be licensed to do business in this state when they shall have complied with the general laws of this State, prescribing the terms and conditions upon which foreign corporations may be licensed * * * provided, however, they shall be required to pay only the license fees and filing fees prescribed by this Act for corporations and associations organized hereunder."

"(b) Such * * * cooperative corporations * * * organized in other states under laws generally similar to this act and licensed * * * in this state as hereinabove provided shall be allowed to carry on any proper activities * * * in this state, and all contracts which could be made by any association incorporated hereunder made by or with such cooperative corporations * * * so organized * * * shall be legal and valid and enforceable in this state, and such associations shall be entitled to all of the rights, powers, privileges and remedies set forth in this act."

"1265 (30) Each association organized hereunder shall pay an annual license fee of ten dollars ($10.00) but shall be exempt from all license taxes or taxes upon capital stock or reserve funds held by it."

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AUG 13 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 243

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED,

*Petitioner,*

v.

DISTRICT OF COLUMBIA

*Respondent.*

# BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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*Petitioner,*

v.

DISTRICT OF COLUMBIA

*Respondent.*

# BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 45-72) is not reported. The opinion of the United States Court of Appeals for the District of Columbia is reported at 119 F. (2d) 787.

## STATEMENT OF THE CASE

The facts are correctly and concisely stated in the opinion of the Court of Appeals (R. 157, et seq.) and are correctly stated in greater detail by the Board of Tax Appeals on pages 45-58 of the record.

## SUMMARY OF ARGUMENT

The questions decided by the United States Court of Appeals for the District of Columbia in this case are not of general importance. The Court held (a) the petitioner to be the owner of certain intangible personal property taxable in the District of Columbia, and (b) the petitioner to be the owner of certain milk and cream sold in the District of Columbia, and therefore required to pay the District of Columbia business privilege tax measured upon the receipts derived from such sales. Liability for the taxes depends in great degree upon ownership of the property, which ownership necessarily must be determined by the contracts between the Association and the producers establishing the relation and method of dealing employed by these particular parties. The facts establishing the relation between this Association and the producers certainly have no bearing upon the ownership of property held by other taxpayers within or without the District of Columbia. The effect and importance of the decision of the Court of Appeals is limited to this petitioner.

2. The statutes here involved have been repealed, and questions arising thereunder are not of sufficient public importance to require the consideration of this Court.

3. The decision of the Court of Appeals is correct. During the tax years involved, the petitioner's sole place of business and "commercial domicile" was in the District of Columbia. The petitioner was clearly the owner of the intangibles in question, which had a taxable situs in the District. Petitioner was likewise the owner of milk and cream which it sold to local dairies, and was liable for a business privilege tax measured upon the gross receipts derived from such sales.

## ARGUMENT

### I

**The questions decided by the Court of Appeals in this case are not of general importance.**

The tax statutes here involved were confined in their operation to the District of Columbia. This Court ordinarily will not review cases arising under such statutes. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285.

Jurisdiction to bring up cases by certiorari from the United States Court of Appeals for the District of Columbia was given for the purpose of having questions of general importance decided by this Court when such decisions are in the public interest. [1] The question of this petitioner's tax liability to the District of Columbia is not one of general importance. While the petitioner suggests that the questions decided in this case are of importance to other marketing associations, it is plain from an examination of the record, petition, and supporting brief that the petitioner is merely seeking another hearing on the merits of the case. This Court will not grant a writ of certiorari merely to review the evidence or inferences drawn from it. *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178.

The Court of Appeals determined in this case that the petitioner was the owner of certain intangible personal property and that such property had a taxable situs in the District of Columbia. The Court also held that the petitioner was the owner of certain milk and cream which it sold in the District of Columbia during the calendar year 1936 and was, therefore, subject to a business privilege tax measured upon

[1] See:
*Magnum Co.* v. *Coty*, 262 U.S. 159, 163;
*Layne & Co.* v. *Western Well Works*, 261 U.S. 387, 392;
*Southern Power Co.* v. *Pub. Serv. Co.*, 263 U.S. 508.

the gross receipts derived from such sales. These questions of ownership necessarily were determined upon the facts peculiar to this case. Certainly the contracts between this Association and the producers and the facts regarding its method of doing business in the District of Columbia cannot determine the ownership of property held by other cooperative associations. Neither the petition nor the supporting brief contain any support for the suggestion that the decision of the Court of Appeals is important to other associations. The *amicus curiae* brief filed herein likewise makes no attempt to draw an analogy between the petitioner's contracts and the manner in which it conducts its business and the contracts and manner of doing business employed by other associations, nor does it point out why or how any other cooperative is affected by the decision of the Court of Appeals in this case.

## II

**The statutes here involved have been repealed and the questions arising thereunder are not of sufficient public importance to require the consideration of this Court.**

The District of Columbia statute imposing taxes upon intangible personal property was repealed by Section 1, Title IV, District of Columbia Revenue Act of 1939 (53 Stat. 1107), D. C. Code, 1929, Title 20, Part 5, Page 161, Supplement V.

Title VI of the District of Columbia Revenue Act of 1937 imposed a business privilege tax for the fiscal year 1937-1938 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III. The Act of May 16, 1938, to amend the District of Columbia Revenue Act of 1937, reenacted Title VI, and specifically provided in Section 16 thereof that the title should expire June 30, 1939 (52 Stat. 369), Sec. 970o., Title 20, D. C. Code, 1929, Supplement V.

The questions arising under acts which have been repealed are not of sufficient public importance to require the consider-

ation of this Court. *District of Columbia* v. *Sweeney*, 310 U.S. 631.

## III

### The decision of the Court below is correct.

The decision of the Court of Appeals holds that petitioner was the owner on the tax dates involved of certain stocks, bonds, cash, and accounts receivable; that it had a "commercial domicile" in the District of Columbia and is subject to the District tax upon such intangibles; that the petitioner was the owner of milk and cream sold in the District of Columbia during the calendar year 1936, and it is subject to a tax measured upon the gross receipts derived from such sales; and that assessments of such taxes were validly made against the petitioner.

Petitioner's principal objection to the tax is based upon the contention that the relation between the Association and the producers is that of principal and agent, and, therefore, the property involved was owned by the individual members of the Association. The questions relating to petitioner's liability for each of the taxes and the validity of assessments thereof are hereafter discussed separately.

### (a) Intangible Personal Property Taxes

*Generally*

Section 754, Title 20, D. C. Code, 1929 (39 Stat. 717) was in effect during the periods here involved, and provides, in part, as follows:

> "The moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the Dis-

trict of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or *engaged in business* within said District shall be scheduled and appraised in the manner provided by section 753 of this title for listing and appraisal of tangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District not less than five-tenths of 1 per centum of the value thereof: * * *." (Emphasis supplied.)

On the tax dates here involved, the petitioner had its principal and, indeed, its only real office at 1731 I Street, N.W., in the District of Columbia. All books and records of the Association were kept at such office; there its officers and employees had their offices; there the officers and directors met and formulated the policies of the Association; checks were drawn in payment of milk produced by its members and for dividends paid to its members; in fact, all business of the Association was transacted in or from such office (R. 99). One directors' meeting was held in Maryland each year in order to comply with the laws of that State (R. 99). The Association also maintained an office in Hyattsville, Maryland, required under the Maryland statute, at which place no business was transacted (R. 99). On June 25, 1938, petitioner moved its principal office and records to Maryland but continued, and still continues, to carry on its principal business functions, namely, the sale of milk and cream, within the District. In addition, petitioner maintains storage space in the District for the storage of cream (R. 107). There would seem to be no question that the petitioner was "engaged in business" in the District on July 1, 1935, July 1, 1936, and July 1, 1937, the tax dates here involved, as contemplated by the intangible personal property tax law, and is subject to taxation upon

all its intangible personal property having a taxable situs therein.

*Hazen* v. *National Rifle Ass'n of America*, 69 App. D. C. 339, 101 F. (2d) 432;

*Stanford University Bookstore* v. *Helvering*, 65 App. D. C. 365, 83 F. (2d) 710;

*District Grocery Stores, Inc.*, v. *District of Columbia*, 24 F. Supp. 447.

The Association established its "commercial domicile" in the District of Columbia and it became liable for taxes to the District as if it had been incorporated or domiciled therein.

*Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193, 80 L. Ed. 1143.

See also:

*Hazen* v. *National Rifle Ass'n of America*, *supra*.

Petitioner contends that the intangible personal property held by the Association on the tax dates involved was not the property of the Association but that such property belonged to certain of its members and was held and invested by the Association as agent for such individual members, and petitioner argues that such property is not subject to taxation by the District for the reason that the individual member owners thereof are domiciled without the District. The integrity of petitioner's argument in this respect is somewhat weakened by the fact that for each of the years involved the petitioner reported a portion of such property to the Assessor, D. C., and paid, without protest, a tax thereon (R. 7). No contention is made that the intangibles of the Association have a taxable situs in any jurisdiction other than the District.

The assets of the Association were acquired in several ways:

(1) The principal income of the Association results from the deduction or retention of a portion of the amount received for the milk or cream produced and delivered by its members (R. 106). The Association agrees to sell or dispose of all the milk and cream delivered by the individual members and is

authorized to deduct from the proceeds of such sales an amount "which may be necessary to meet its proper proportion of the expenses incurred or to be incurred by the Association, together with such other sums as may be necessary to cover operating expenses, interest, overhead, depreciation, all obligations or debts of the Association lawfully incurred, as well as to create reasonable reserves or other funds reasonably estimated as essential or probable to be incurred by the Association pursuant to its constitution and by-laws" (R. 22). While the Board of Directors has recommended and the members of the Association have authorized deductions in excess of 1¢ per gallon (R. 27) and such deductions have been as high as 4¢ per gallon and as low as ⅓ of a cent per gallon (R. 107), it appears that such deductions are now made at the rate of 1¢ per gallon (R. 87, 88, 91, 100, 107).

(2) The Association purchases milk and cream from sources other than its members and resells such milk and cream at a profit (R. 105, 106, 120, 136).

(3) The Association derives profits or losses from the sale of securities (R. 106, 117, 131).

(4) The Association receives interest and dividends from investments (R. 106, 131).

(5) The contract between the Association and its members provides that if the member fails to deliver his milk or cream as directed by the Association, he will pay the Association, as liquidated damages, 5¢ per gallon for all milk, and 20¢ per gallon for all cream, so withheld (R. 25). Such defaulting member may also lose all right to any equity he may have in the Reserve Fund or other property of the Association (R. 41). It appears, however, that the Association has derived no income from this source (R. 105, and 106).

Witnesses for the Association made frequent reference to a "Reserve Fund" or "Revolving Fund" and the arguments of both petitioner and *amicus curiae* apparently assume that the intangible tax has been levied upon such "Fund". Apparent-

ly such references are to the net worth of the Association. No mention is found in the by-laws or contracts of the Association of a "Revolving Fund". Paragraph (g) of the by-laws refers to a "reserve fund" but any such fund is nowhere defined. If any such fund exists, it would appear to have no official status and the purpose thereof and the property contained therein has not been satisfactorily described.

Although the Association has paid dividends annually since 1934 (R. 112), such payments are within the sole discretion of the Board of Directors (R. 40, 103, 113). The members have no more right to demand and receive a dividend or distribution than the stockholders of any corporation. The by-laws of the Association require that any division or distribution of the surplus shall be "on the basis of the value of milk delivered" by the members under their marketing agreements. It appears that the Board of Directors has followed a practice of making distribution on the basis of the proportionate value of each member's milk delivered during the sixth year prior to the year in which such distribution is made (R. 101, 102). Petitioner's argument that these distributions are merely a return of the amount which each individual member contributed to the Association's surplus in the sixth year prior to such distribution is obviously without merit. If there is a loss for one particular year that is shared by the entire "Revolving Fund" rather than by that particular year's fund (R. 90, 102). Any relation between the amount distributed in any year and the amount added to the Association's surplus in the sixth year prior to such distribution is purely accidental. For example, distributions were made on November 1, 1935 (R. 112), although the Association suffered substantial losses in 1929 (the sixth year prior to such distribution) (R. 91, 123). No record is kept of the profit or loss derived from the amount added to surplus in any particular year. Losses are not deducted from the surplus of any particular year but are deducted from the entire assets of the Association (R. 91, 102,

123). The annual distributions to members have no direct relation to what the contributions of members for any particular year may have earned (R. 118). Since the Association has no stock, dividends or distributions of surplus must be made on some other basis, hence the provision for distribution on the basis of the value of milk delivered by the individual members (R. 40). The Association's surplus is accumulated in the same manner as the surplus of other corporations, and is the property of the Association to the same extent.

Petitioner's argument respecting ownership of the property in question is based upon the statement of the facts in the petition for writ of certiorari (p. 7) regarding such ownership, which statement is, in large degree, merely a series of quotations of statements of conclusions by petitioner's witnesses which are unsupported by the record. Counsel for *amicus curiae* likewise adopts these erroneous conclusions (*amicus curiae* brief p. 4) and its argument respecting the material issues here involved is based thereon.

*Accounts Receivable*

Petitioner also contends that "Accounts Receivable from Dealers" included in the tax base for each of the three years were not assets of the Association. The petitioner contends that the Association was not the owner of milk delivered to distributors and that such Accounts Receivable were due the producers or members and that the Association was merely acting as agent for its members in the collection of such accounts.

Under the contract entered into between the Association and the individual producers (R. 20-28) the producer agrees to deliver or have delivered by such carrier or carriers as the Association may designate all milk or cream produced on all farms owned or operated by the producer (except such milk or cream as is required for home and farm consumption) to such shipping stations, plants, or other consumer as may be designated

from time to time by the Association. The Association agrees to dispose of the producer's milk and cream and guarantees payment to the producer for the milk and cream delivered (R. 26, 110).

Under contracts between the Association and milk distributors in the District, the distributor agrees to buy its entire supply of fluid milk and cream from the Association and agrees to pay the Association for all milk delivered to it by the Association or its members (R. 136-139). The Association agrees to furnish the distributor a certain quantity of milk produced by its members in accordance with the regulations of the District of Columbia Health Department and then directs the members to whom to make delivery of their milk (R. 98).

When the milk of any producer is delivered to a distributor it loses its identity (R. 108, 109, 126) and such producer has no claim to any particular part of the receipts from such milk (R. 92). The amount which the Association pays a producer for milk he has delivered during any month is determined by a more or less arbitrary formula and has no direct relation to the manner in which his milk is disposed of by the distributor or the price which the Association receives for the particular milk which he has delivered (R. 92, 93, 95, 108, 109, 124, 126).

The total receipts of the Association from the sale of milk to distributors and cream to ice cream manufacturers, etc., are pooled. The member producers have no claim to any portion of such funds (R. 92) but merely a claim against the Association for amounts due the respective producers for milk delivered under their individual contracts with the Association.

Most producers were paid two prices for their milk. By use of a formula based upon the producer's deliveries during the months of October, November, and December (R. 92, 94 and 95), a portion of his milk was allotted to "fluid consumption" for which he received the "Class One" price. Apparently, the portion of the producer's milk for which he received the "fluid consumption" or "Class One" price was supposed to have some

theoretical relation to the percentage of the total milk sold by the Association which was used by the Distributors for fluid consumption. For the remaining portion of such milk, the producers were paid by the Association the "Class Two" or "surplus" price which was a relatively much lower price. The producers were paid according to this formula, regardless of the fact that all of their milk may have been used for fluid consumption or that none of it may have been so used (R. 93, 109, 110, 124, 126).

All producers were not paid in accordance with such formula (R. 94, 95, 96, 97). In the case of new members coming into the Association after November 1 of any year, the Association allowed them to select one of two other plans: (1) the Association agreed to purchase their milk for 1¢ per gallon under the weighted average price of milk from month to month, or (2) would pay them in accordance with the formula which allotted 50% (or 55%) to "Class One" or "fluid consumption" and the remaining 50% (or 45%) to "Class Two" or "surplus" (R. 94, 96, 125). It also appears that prior to September 1, 1936, the method of payment was based, to some extent, upon seniority (R. 94, 127).

The distributor's only obligation in connection with payment for milk delivered under its contract with the Association was to the Association and not to the producers. It seems plain that the "Accounts Receivable from Dealers" were due only to the Association and were the property of the Association.

In addition to the principle announced in the case of *Wheeling Steel Corp.* v. *Fox, supra*, the tax assessed against the corporation upon its Accounts Receivable can be supported on the ground that such Accounts Receivable had acquired a "business situs" in the District.

*New Orleans* v. *Stempel*, 175 U.S. 309, 44 L. Ed. 174;

*Bristol* v. *Washington County*, 177 U.S. 133, 44 L. Ed. 701;

*State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U.S. 388, 48 L. Ed. 232;

*Metropolitan L. Ins. Co.* v. *New Orleans*, 205 U.S. 395, 51 L. Ed. 853;

*Liverpool Etc. Ins. Co.* v. *Orleans Assessors*, 221 U.S. 346, 55 L. Ed. 762;

*N. Y. Ex Rel. Whitney* v. *Graves*, 299 U.S. 366.

Such Accounts Receivable arose out of, and were necessarily used as an integral part of, the business of the Association carried on in the District of Columbia.

**(b) Business Privilege Taxes**

Section 5, Title VI, of the District of Columbia Revenue Act of 1937 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III, provides, in part, as follows:

> "For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of $2,000 derived from such business for the calendar year 1936: *Provided, however*, That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

"Business" is defined in Section 1(d) of said Title VI as follows:

> "The term 'business' shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property and in or on property owned by the United

> States Government in the District of Columbia, not including, however, labor or services rendered by any individual as an employee for wages, salary, or commission."

And in Section 1(e) of said title the term "gross receipts" is defined to mean:

> "* * the gross receipts received from any business in the District of Columbia, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services or other costs, interest, or discount paid, or any other expenses whatsoever * * *."

There would appear to be no question that petitioner was engaged in business in the District of Columbia within the meaning of Title VI.

*Hazen* v. *National Rifle Ass'n of America, supra;*
*Army & Navy Club* v. *Dist. of Columbia*, 8 App. D.C. 544;
*District Grocery Stores, Inc.*, v. *District of Columbia, supra.*

On October 6, 1937, the Association filed a business privilege tax return with the Assessor, D. C., reporting gross receipts for the calendar year 1936 in the amount of $124,815.59, representing sales of milk and cream purchased from persons other than its members and resold by the Association (R. 133, 134). The taxes computed upon such receipts were paid by the Association without protest. The report of the accountant of the Association furnished the Board of Tax Appeals discloses that only $39,423.43 of the total amount reported in its return was received from sales of milk and cream purchased from persons other than its members and resold in the District (R. 121); the Board used this latter figure and the Association apparently concedes its liability to taxation upon such receipts.

The Association, however, objects to payment of a tax measured upon the gross receipts from milk and cream produced by its members which was sold by the Association and delivered to distributors located in the District during the calendar year 1936. Petitioner's argument in this respect is similar to that advanced in connection with its objections to taxation of "Accounts Receivable from Dealers", namely, that it was not the owner of the milk and cream sold and delivered to local distributors but was merely the agent for its member producers in such transactions, and sales to the distributors were made by the producers and not by the Association. Under the petitioner's theory, only its gross commissions from such sales and not the gross receipts therefrom would be included in the business privilege tax base.

The Association has two classes of contracts with distributors (R. 130): (1) where the distributor purchases his entire milk supply from the Association, he pays the Association for that milk only that is sold by him for fluid consumption of his customers, and he is allowed to return to the Association, without pay therefor, the surplus milk not needed by him for fluid consumption. He is required, however, to reduce such surplus to cream, in payment for which process he retains the skim milk, whey, and other by-products. The cream resulting from such operation is sold by the Association to ice cream manufacturers and other concerns at a price which produces a return to the Association for such surplus greatly less than the price received for milk destined for fluid consumption (R. 92); (2) where the distributor does not purchase his entire milk supply but only a part thereof from the Association, such distributor is required to pay for all milk delivered to him at fluid milk consumption prices (R. 130). Apparently, the prices charged this latter class of distributors are not uniform (R. 130). These agreements regarding prices are made by the Association and the distributors without consulting the producers (R. 113).

The Association does not pay the producers the price received from the distributors for the milk produced by each producer less a commission or "brokerage". The Association pays the individual producer, and the amount so paid has no direct relation to the use of the individual producer's milk or the price which the Association receives from the distributor for such milk (see Part III (a) of this brief). The Association guarantees that the producer will receive payment for his milk whether the distributor pays the Association or not (R. 110), and can require specific performance of the contract (R. 25). Under the terms of the agreements between the Association and the producers, the latter agree to deliver to such point or points as the Association shall direct and the Association agrees to pay for all the milk produced by the producers and not needed for their personal use. When the milk is delivered to the distributor, title passes from the producer. If the milk is not sold by the distributor it is returned to the Association and the individual producer has no direct interest in, or responsibility for, its disposition by the Association or the price received therefor by the Association. It seems plain that the agreement between the Association and the producers creates a contract of sale, and that the relation between the Association and the producers is that of debtor and creditor.

*In re Rabenau* (D.C., 1902), 118 Fed. 471, 475;

*Texas Farm Bureau Cotton Assn.* v. *Stovall*, 113 Tex. 273, 253 S.W. 1101, 1107;

*Neith Coop. Dairy Products Assn.* v. *National C. P. Federation*, 217 Wisc. 202, 257 N.W. 624, 98 A.L.R. 1403;

*Arbuckle* v. *Kirkpatrick*, 98 Tenn. 221, 39 S.W. 3, 36 L.R.A. 285;

*Arbuckle* v. *Gates*, 95 Va. 802, 30 S.E. 496;

23 R. C. L. 1218, and cases cited.

The Board of Tax Appeals determined that the relation between the Association and the producers is that of debtor and creditor, and that the agreement between them creates a con-

tract of sale by the producers to the Association. The Court of Appeals sustained the Board's findings of facts. These concurrent findings are supported by the evidence and should be accepted by this Court. *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 182.

### (c) Validity of Assessments

Questions regarding the validity of assessments of personal property and business privilege taxes against the petitioner were first raised before the Court of Appeals. The Court held it was not required to consider such questions but was free to do so (R. 158). The Court properly held that the assessments were clearly authorized by the statutes (R. 159-160). *Sturges* v. *Carter*, 114 U.S. 511.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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JUL 18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 243.

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

## BRIEF OF THE NATIONAL COOPERATIVE MILK PRODUCERS' FEDERATION AS AMICUS CURIAE.

CHARLES W. WILSON,
*Attorney for Amicus Curiae.*

July 17, 1941.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 243.

MARYLAND AND VIRGINIA MILK PRODUCERS' ASSOCIATION, INCORPORATED, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

## BRIEF OF THE NATIONAL COOPERATIVE MILK PRODUCERS' FEDERATION AS AMICUS CURIAE.

### FOREWORD.

The National Cooperative Milk Producers' Federation, hereinafter referred to as the Federation, by its counsel, respectfully submits herewith its brief as *amicus curiae,* in the within cause, having first secured permission of the Petitioner and Respondent in this case.

### STATEMENT OF INTEREST.

The Federation is a non-stock, non-profit corporation, organized and existing under the laws of the State of Illinois and is composed of fifty-nine farmer-owned and farmer-controlled cooperative dairy associations which are engaged either in marketing, or manufacturing and marketing, the milk and other dairy products of their farmer-

members throughout the continental United States and in several foreign markets. These member associations of the Federation are bona fide farmer cooperatives incorporated under the cooperative enabling statutes of the several States and conform to the specifications of the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. 291, 292. They are organized for the mutual benefit of their members who are either farmers producing milk or cooperative creameries in turn owned and controlled by farmers producing milk. They are located in forty-one States of the Union and the majority of them, in respect to marketing the milk production of their members, are engaged in interstate commerce including the District of Columbia.

The within proceedings involves the character of organization and method of operation of one of such member associations, viz., the Maryland and Virginia Milk Producers' Association, Inc., the Petitioner in this cause. The decision of the Court below, as we believe, brings into question the fundamental concept of agricultural cooperation, namely, the non-profit motive of cooperative enterprise and, if permitted to stand, bids fair to destroy this way of agricultural self-help which through the years has found mutual encouragement in the enactments of Congress and the legislatures of the States as well as in the interpretations placed upon them by the courts.

The decision of the Court below is a challenge to cooperation and it is in the interest of the member associations of the Federation whose character of organization and method of operation parallels those of the petitioner-association herein and who, under facts similar to those in the case at bar, may be confronted with the adverse ruling of the United States Court of Appeals for the District of Columbia, that this brief *amicus curiae* is submitted in aid of this Court's determination respecting its jurisdiction in this case.

In so doing, counsel for *amicus curiae* is not unmindful of the fact that he will be confronted with the contention

that each case must turn necessarily on its own peculiar facts and circumstances and that the precedent of the decision below may be unavailing in another jurisdiction but, as he has advised *amicus curiae*, the opinion of the Court below as to the character and method of operation of petitioner-association is contrary to the great weight of authority, federal and state, and that as to the application of the taxing statutes involved is contrary to the prior decisions of this Court and repugnant to the Fifth Amendment and the Commerce Clause of the Federal Constitution.

## QUESTION OF GENERAL IMPORTANCE PRESENTED.

Since this decision, as we believe, casts into doubt the legal status of agricultural cooperative associations and is contrary to the judicial precedents of this and other forums as well as to the concept of agricultural cooperation as expressed in federal and state statutes, we respectfully submit, that it presents a question of general importance and the Petition for Writ of Certiorari should be granted.

## JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 21, 1941. (R. 168.) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Section 347), and Section 975 (a), Title 20, Supp. V., Code of the District of Columbia, 1929 (52 Stat. 371, C. 223, Section 8).

## OPINION BELOW.

The opinion of the Court below and the opinion of the Board of Tax Appeals for the District of Columbia from which the appeal was taken in the first instance are as recited in the Petition for Writ of Certiorari. (p. 3.)

## FACTS.

The facts, counsel for *amicus curiae* believes, are as set forth in the Petition for Writ of Certiorari, as are the questions presented here for review. (p. 3 to 11.)

## SPECIFICATION OF ERRORS.

Those errors which we believe inhere in the decision of the Court below, to which *amicus curiae* addresses itself in its brief and at the risk of being repetitious, are as follows: We believe the Court erred—

1. In failing to hold that petitioner-association was the agent of its farmer-members in respect to the marketing of their milk and the collection and disbursement of the proceeds arising from the sale thereof.

2. In holding petitioner-association, as a corporate entity, was engaged in business for gain or economic benefit in the District of Columbia within the purview of the Act of Congress (Title 20, Sections 970 to 970 (15), Supp. III to the Code of the District of Columbia, 1929).

3. In holding that petitioner-association had a commercial domicile and was engaged in business in the District of Columbia within the purview of Section 752, et seq., Title 20, Part V, Code of the District of Columbia, 1929, pertaining to the taxation of personal property in the District of Columbia.

4. In holding that the revolving fund representing excess brokerage deducted from the net proceeds of the sale of its farmer-members' milk not depleted ad interim for the lawful and authorized expenditures of the association, including the establishment of reserves, was the property of petitioner-association rather than the property of its farmer-members held in the custody of the petitioner-association under fiduciary obligation.

5. In holding that accounts receivable from dealers representing uncollected proceeds for the sale of its farmer-

members' milk and collectible by the association was the property of the petitioner-association and not its farmer-members.

6. In holding said revolving fund and accounts receivable from dealers subject to taxation by the government of the District of Columbia under the authority of the Act of Congress (Title 20, Part V, Sections 752, et seq., Code of the District of Columbia, 1929).

7. In holding that the measure of tax amenability of petitioner-association under the Act of Congress (Title 20, Sections 970 to 970 (15), Supp. III to the Code of the District of Columbia, 1929) was the gross receipts derived from the sale of all of its farmer-members' milk.

## ARGUMENT.

### I.

**A. Petitioner-Association is a Non-Stock, Non-Profit, Farmer-Owned and Farmer-Controlled Cooperative Dairy Marketing Association, Organized and Existing Under the Cooperative Associations Enabling Act of the State of Maryland, Domesticated Under the Similar Statute of the State of Virginia, and Engaged in Marketing the Milk of Its Farmer-Members, All Non-Residents of the District of Columbia, and as Such is Distinguishable from a Proprietary Corporation and is, in Fact, the Antithesis of the Commercial Corporate System.**

Seemingly in conflict with the concept of agricultural cooperation as expressed in various acts of Congress[1] and

[1] *Capper-Volstead Act*, 42 Stat. 388, 7 U. S. C. 291, 292; Section 6, *Clayton Act*, 38 Stat. 731, 15 U. S. C. 17; *Cooperative Marketing Act*, 44 Stat. 802, 7 U. S. C. 451 *et seq.*; *Agricultural Marketing Act of 1929*, 46 Stat. 11, 12 U. S. C. Sec. 1141; *Amendments to Agricultural Marketing Act of 1929*, 49 Stat. 316, 12 U. S. C. 1141e, 1141j; *Bituminous Coal Act of 1937*, 50 Stat. 72, 15 U. S. C. 828 *et seq.*, particularly Section 833 (i) 13; *Robinson-Patman Act*, 49

contrary to the prior decisions of this Court, the overwhelming weight of authority, federal and state, and the cooperative association enabling statutes of the States of Maryland and Virginia, the United States Court of Appeals for the District of Columbia holds petitioner-association to be a proprietary corporation and owner of the proceeds arising from the sale of its farmer-members' milk, rather than their agent or other fiduciary in respect to the marketing of their milk and the collection, investment and distribution of the proceeds of the sales thereof. (R. 162.)

In consequence of this holding, the Court sustained the tax assessment of petitioner-association as owner of certain accounts receivable and revolving fund representing proceeds from the sale of its farmer-members' milk. (R. 160-164.)

*1. The fundamental difference between capitalistic and cooperative enterprise is one which has been commonly accepted by legislatures and courts alike.*

The importance of a well recognized fundamental distinction between a cooperative association and the ordinary proprietary corporation[2] may not be minimized in the in-

Stat. 1526, 15 U. S. C., Supp. IV, 13-13b, 21a; *Internal Revenue Code*, Sections 101 (12) and (13), 43 Stat. 253-355, 52 Stat. 480, 26 U. S. C. 101; *Grain Futures Act*, 42 Stat. 998, and *Commodity Exchange Act*, 42 Stat. 1000, 7 U. S. C. 7-10a; *Packers and Stockyards Act*, 42 Stat. 164, 7 U. S. C. Sec. 207; *Farm Credit Act*, 48 Stat. 257, 12 U. S. C. 1134.

[2] "The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of the products marketed through the association by the respective members * * * Ownership and control of the association resides in the member, not on the basis of invested capital, but as one of the rights or incidents of member-

stant case. The vulnerability of the opinion of the Court below rests in its failure to recognize this distinction. Not only did the Court fail to recognize the distinction, but it held the petitioner-association to be a proprietary corporation which necessarily carried with it certain tax amenabilities. In fact, it held petitioner-association to be that which it is not,—to be that of which it is the antithesis.

The record is clear that petitioner-association is a cooperative marketing association. (R. 1, 2, 24-43, 86.)

In holding petitioner-association to be a proprietary corporation and owner of these funds, the Court below ignored completely the prior decisions of this Court which recognize the fundamental differences alluded to *supra* between a non-profit cooperative association and the ordinary corporate concern organized and operated for profit.

That such a distinction exists was recognized by this Court in *Frost* v. *Corporation Commission*, 278 U. S. 515, 523, 73 L. ed. 483, 49 S. Ct. 235. The distinction is alluded to again in *United States* v. *Rock Royal Cooperative, Inc. et al.*, 307 U. S. 533, 563, 83 L. ed. 1446, 59 S. Ct. 993. *Vide*, also:

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ship, each member having limited voting rights. The voting control thus decentralized permits, however, through the agency of the association, a centralized economic control of the product * * * customarily accomplished by use of the Marketing Contract which provides for the marketing of the products of the members exclusively through the Association.

"* * *

"* * * The association does not engage in the operation common to the profit enterprise, namely, to buy low and sell high. * * * There is no 'profit' as such to the legal entity—the association. There are no dividends in the ordinary sense, but merely remittances to members on a pro-rated basis of any accumulated funds on hand in excess of operating costs and necessary or legally required reserves.

"* * * The association, ordinarily, acts essentially as an agent of its members in ascertaining or developing markets, and in the selling and distributing of the products. The marketing transaction is not complete until the proportion due each member from the proceeds of sales has been remitted. In the true sense, there is no 'profit' involved." *The Law of Cooperative Marketing*, Evans and Stokdyk, The Lawyers Cooperative Publishing Company, Rochester, New York, 1937, pp. 3 to 5, inclusive, 30 to 32.

Dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Mr. Justice Stone, in *Frost* v. *Corporation Commission*, 278 U. S. 515, 536, 73 L. ed. 483, 49 S. Ct. 235; *Board of Trade* v. *Olsen*, 262 U. S. 1, 40, 67 L. ed. 839, 43 S. Ct. 470, sustaining the Grain Futures Act, 42 Stat. 998, 7 U. S. C. 1-17; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 173, 55 L. ed. 389, 31 S. Ct. 342, and *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, 21, 60 L. ed. 493, 36 S. Ct. 236, sustaining the income tax exemption of cooperative associations under federal revenue measures.

The Court below ignored further the many statutes, federal and state, which similarly recognize this distinction and wherein, unlike the ordinary commercial corporation, cooperative associations, their activities and contracts, are afforded peculiar protection. One of such statutes has received the favorable consideration of this Court. *Liberty Warehouse Company* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291.

It is respectfully submitted, therefore, that in failing to draw this distinction between petitioner-association and the ordinary corporate enterprise, the Court below has decided a question contrary to law and adverse to the legal, social and economic interests of cooperative as distinguished from capitalistic enterprise.[3] In holding as it does, the Court has

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[3] See cases *infra* this brief, p. 13. See also: *Potter* v. *Dark Tobacco Growers Co-op Assn.*, 201 Ky. 441, 257 S. W. 33; *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 197 N. W. 936; *Arkansas Cotton Growers Co-op Assn.* v. *Brown*, 168 Ark. 504, 270 S. W. 946; *Manchester Dairy System* v. *Hayward*, 82 N. H. 193, 132 A. 12; *Burley Tobacco Growers Co-op Assn.* v. *Rogers*, 88 Ind. App. 469, 150 N. E. 384; *Barns* v. *Dairymen's League Co-op Assn.*, 220 App. Div. 624, 222 N. Y. Supp. 294; *Dark Tobacco Growers Co-op Assn.* v. *Dunn*, 150 Tenn. 614, 266 S. W. 308; *Warren* v. *Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104 So. 264; *Lee* v. *Clearwater Growers Assn.*, 93 Fla. 214, 111 So. 722; *Local Dairymen's Co-operative Assn.* v. *Potvin*, 54 R. I. 430, 173 A. 535; *Johnson* v. *Staple Cotton Co-op. Ass'n.*, 142 Miss. 312, 107 So. 2; *Lennox et al.* v. *Texas Cotton Co-op. Assn.*, 55 S. W. (2nd) 549, reversing *Texas Cotton Co-op. Assn.*

decided a question which threatens the continued existence of a form of social and economic control recognized by Mr. Justice Brandeis in his dissenting opinion to the majority of this Court in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517, 579, 77 L. ed. 929, 53 S. Ct. 481, 85 A. L. R. 699, as a "way * * * which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure."

**B. Petitioner-Association is the Agent or Other Fiduciary of Its Farmer-Members and, Therefore, the Revolving Fund Represented by Investments in Intangibles Carried in Its Name, and Accounts Receivable from Milk Dealers, Collectible by it, Each Arising Out of the Sale of Milk Produced by and Marketed for Its Farmer-Members, Belong, Not to the Association, but to the Farmer-Members.**

Under the decision of the United States Court of Appeals for the District of Columbia, accounts receivable representing the purchase price of milk sold to milk dealers and owing by them were held properly assessed as the property of the petitioner-association. In like manner, the decision of the Court upholds the assessment of the revolving fund, comprised of stocks, bonds, bank deposits, etc., into which the unexpended brokerage deducted from the proceeds from the sale of the farmer-members' milk was converted, as the property of petitioner-association. (R. 160-164.)

In so holding, the Court has decided a question of law contrary to the prior decisions of this Court, the great

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v. *Lennox*, 37 S. W. (2nd) 331; *Tobacco Growers' Co-op. Ass'n.* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; *Nebraska Wheat Growers' Assn.* v. *Norquest*, 113 Nebr. 711, 204 N. W. 798; *Minnesota Wheat Growers Coop. Marketing Asso.* v. *Huggins*, 162 Minn. 471, 203 N. W. 420; *List* v. *Burley Tobacco Growers Co-op.*, 114 Ohio St. 361, 151 N. E. 491; *Clear Lake Co-op. Livestock Asso.* v. *Weir*, 200 Iowa 1293, 206 N. W. 297; *Oregon Growers Co-op. Ass'n.* v. *Lentz*, 107 Ore. 561, 212 P. 811; *Stark County Milk Producers Asso.* v. *Tabeling, etc.*, 129 Ohio St. 159, 194 N. E. 16; *Washington Cranberry Asso.* v. *Moore*, 117 Wash. 430, 201 P. 773.

weight of authority, federal and state, and the statutes of the States of Maryland and Virginia, under which petitioner-association is incorporated in the one instance, and domesticated, in the other.

That the terms of the marketing contract, read by itself, or in conjunction with the by-laws of petitioner-association and the cooperative laws of the States of Maryland and Virginia, belie the conclusion that ownership of the accounts receivable and revolving fund is in the petitioner-association may not be gainsaid under the prior decisions of this Court. The Court's decision, in this regard, is in seeming direct conflict with the decision of this Court in *Sturm* v. *Boker*, 150 U. S. 312, 326, 37 L. ed. 1107, 14 S. Ct. 99, cited in the dissenting opinion of Chief Justice Groner. (R. 167.)

There as here, the letters in that instance, the contract in this, were couched in terms of consignment and not terms of sale.

Going beyond the consignment stipulations in the marketing contract, it is absolutely devoid of any language importing a passage of title to the milk or cream to the petitioner-association. (R. 20-29, 86.)

Petitioner-association's by-laws in no wise portend a purchase and sale arrangement as between it and its farmer-members. (R. 30-43, 86.)

The appropriate provision of the Maryland statute under which petitioner-association is incorporated, viz., Section 441, Article 23, Flack's Annotated Code of Maryland, 1929, Volume 1, provides: "Any association, organized under this Act, as agent to sell the products of members may operate upon a non-profit basis by contracting to pay the members, for products sold by said members to or through the association, the resale price minus uniform charge to cover the expenses in the handling of said products * * *". (R. 123.) (Appendix "B", Petitioner's Supporting Brief, p. 38.)

Thus, when the marketing contract in the instant case on its face imports a consignment relationship between the petitioner-association and its farmer-members, and when

that is believed to be the unmistakable intention of the parties in the light of petitioner-association's by-laws and the cited provision of the Maryland code under which it is incorporated, it is crystal clear that the pronouncement of this Court in the *Sturm case supra,* applies. The decision of the Court below, on the other hand, is in apparent conflict with and contrary to the decision in the *Sturm case, supra.*

As is pointed out by Chief Justice Groner in his dissent from the majority opinion—"The manner of operation or co-operation is more clearly disclosed in two instruments—petitioner's charter and the contract of membership. In neither is there any mention of title passing to petitioner * * * The agreement clearly points to the relation of factor or agent * * *" (R. 166.)

We submit, whatever be the correct description of the fiduciary relationship existing between petitioner-association and its farmer-members, the holding of the United States Court of Appeals for the District of Columbia is not only contrary to the decision of this Court in the *Sturm case, supra,* but to the great weight of authority, federal and state.

As to the relationship created by the marketing contract it is in apparent conflict with the decisions of the Fifth Circuit Court of Appeals in *Edwards Shoe Factory* v. *Stewart,* 107 Fed. (2nd) 123, 126; *Philips* v. *United States,* 59 Fed. (2nd) 881, decided by the United States Court of Appeals for the District of Columbia, Cert. denied, 287 U. S. 639, 77 L. ed. 553, 53 S. Ct. 88; *Vail* v. *Durant,* 7 Allan 408, 83 Am. Dec. 695 (Mass.) *Vide,* also: *Eastern Livestock Corporation* v. *Dickinson,* 107 Fed. (2nd) 116.

*1. The great weight of authority, with which the opinion of the Court is in direct conflict, is to the effect that the relation between a cooperative association and its members is that of trustee to beneficiary or principal to agent.*

It is generally held that a cooperative marketing contract creates between the association and a member the relation of principal and agent, the association being a sales agency operating for the benefit of its members. 2 *Am. Jur.* p. 27, citing *Phez Co.* v. *Salem Fruit Union*, 103 Ore. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090; *Spencer Co-op. Live Stock Shipping Asso.* v. *Schultz*, 209 Wis. 344, 245 N. W. 99.

That the relation between a cooperative association and its members is that of trustee to beneficiary or principal to agent was held in *Mountain States Beet Growers Marketing Association* v. *Monroe*, 84 Colo. 300, 269 P. 886. And in *Rhodes* v. *Little Falls Dairy Co.*, 230 App. Div. 571, 245 N. Y. Supp. 432, the court held that the contract between a member and his cooperative marketing association relative to the marketing of his crops partakes of a trust or fiduciary character.

The Supreme Court of Texas in *Texas Certified Cottonseed Breeders' Ass'n.* v. *Aldridge*, 122 Tex. 464, 61 S. W. (2nd) 79, reversing *Same*, 59 S. W. (2nd) 320, in construing a cooperative marketing contract entered into under the Texas cooperative statute, and wherein were used terms of purchase and sale, nevertheless held the contract to be one of agency. The court noted particularly (p. 83 of 61 S. W. (2nd)):

> "It being the clear intention of the members to create a true co-operative marketing association, under the powers enumerated by law and by the contracts, to perform certain services exclusively for its members, and to hold in the face of this intention that the delivery of the seed to the association was an absolute sale would destroy it as a cooperative marketing association. The members have conferred on this association, as their selling agent, such title to the cottonseed with

plenary powers to handle and dispose of same, but the association handles the proceeds thereof for the benefit of itself and its members * * *"

In *City of Owensboro* v. *Dark Tobacco Growers' Assn.*, 222 Ky. 164, 300 S. W. 350, the cooperative marketing contract involved included a provision authorizing the association to hypothecate the tobacco to be delivered to it by growers, and the Kentucky Court of Appeals held that this provision of the contract and another requiring the association to account to the grower for the full proceeds of his tobacco less costs and expenses, made it convincing that it was the intention of the parties to effect an agency relationship and not one of buyer and seller. As the court pointed out (p. 352 of 300 S. W.) "* * * it was essentially a sales contract of agency made by each grower with an association of his own creation primarily and essentially for his own benefit, and in no event for the benefit of the non-profit-earning association which the several growers had organized."

In *Pyrke, Commissioner of Agriculture and Markets* v. *Brudno et al*, 243 App. Div. 493, 278 N. Y. Supp. 353, affirmed in 269 N. Y. 652, 200 N. E. 42, it was held that a cooperative dairy association which contracted to sell milk to a dealer to whom each producer of the association made delivery, was a mere agent, notwithstanding the fact that the dealer was to pay the association and that payments were to be mingled with funds belonging to other members and certain deductions were to be made before distribution. *Vide*, also: *Haarparinne* v. *Butter Hill Fruit Growers' Ass'n.*, 122 Me. 138, 119 A. 116; *Brown* v. *Georgia Cotton Growers' Co-op. Association*, 164 Ga. 712, 139 S. E. 417; *California Bean Growers' Association* v. *Williams*, 82 Cal. App. 434, 255 P. 751; *California Raisin Growers' Association* v. *Abbott*, 160 Cal. 601, 117 P. 767; *Colorado-New Mexico Wool Marketing Assn.* v. *Manning, Sheriff*, 96 Colo. 186, 40 P. (2nd) 972; *State* v. *Dairy Distributors, Inc.*, 217 Wis. 167, 258 N. W. 386, 389, 390; *Lake Charles Rice Milling Co.* v. *Pacific Rice*

*Growers' Association* (C. C. A.), 295 Fed. 246; Notes to reported cases, 33 A. L. R. 247, 253; 47 A. L. R. 936, 946; 77 A. L. R. 405, 412, and 98 A. L. R. 1406, 1413. *Contra: Neith Co-op Dairy Products Ass'n.* v. *National Cheese Producers' Federation*, 217 Wis. 202, 257 N. W. 624; *Texas Farm Bureau Cotton Ass'n.* v. *Stovall*, 113 Tex. 273, 253 S. W. 1101, decided in 1923 and relied upon by the Court of Civil Appeals of Texas in *Texas Certified Cottonseed Breeders' Assn.* v. *Aldridge*, 59 S. W. (2nd) 320 and reversed in, *Same*, 61 S. W. (2nd) 79.

In *Emigh* v. *Earling*, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243, it was held by the Wisconsin Supreme Court that the legal title to the milk, to the products thereof, and to the proceeds arising from the sale thereof, under a contract similar in respects to the one involved in the case at bar, but not involving a cooperative association and its members, was at all times in the patrons of the company, and the moneys arising from a sale of the cheese were held by the company in a fiduciary capacity for the beneficial use of the patrons of the company, and the trust character of the fund was not changed by the fact that it was deposited in the bank to the personal account of the company. *Cf. Lambert* v. *Military Ridge Cheese Co.*, 179 Wis. 359, 191 N. W. 555.

*2. The decision of the Supreme Court of New York, Appellate Division, in People* v. *Shoemaker, 228 App. Div. 314, 239 N. Y. Supp. 71, 178 N. E. 869, relied upon by the Court below for the proposition that when a cooperative association's contracts with its milk-producing members have been phrased clearly in terms of agency, it has been conceded that title to the milk passed to the association and that the association is the actual seller of the milk, is not in point.*

The Court below relies to great extent upon the *Shoemaker* case, *supra*, to support its conclusion that the petitioner-association, and not its farmer-members, is the owner

of either the milk or the proceeds arising from its sale, thus making it amenable to taxation of such proceeds.

It is respectfully submitted that the *Shoemaker* case, *supra*, has been misapplied by the Court. That case involved the proposition of whether a milk dealer should be licensed as required by law under circumstances where he bought his total supply of milk from a cooperative association, viz., the Dairymen's League Co-operative Association, organized under the Membership Corporations Law of New York and continuing as such by virtue of the Co-operative Corporations Law. The question presented was whether the defendant dealer was buying milk and cream from producers so as to subject him to the license and bonding provisions of the New York Agriculture and Markets law. The case turned on facts substantially as follows: The association received milk and cream from many producers, commingled it and delivered same to the defendant dealer. The League received payment for the milk and cream thus delivered and in turn commingled it with other funds, from which deductions were made before it was pro-rated among all who delivered milk to the association. While the court conceded that the League's contracts with its producers were of the nature of an agency contract, yet it called attention to a provision of the Co-operative Corporations Law under which the association existed directing that "all contracts, made by the corporation with third parties, for the sale or other disposition of products which the corporation had contracted with members or non-members to market for them, shall in all respects be deemed to be the obligations of the corporation within the meaning of this section, whether made by the corporation as principal or as agent for such members or non-members." It pointed out that the contract between the League and the defendant dealer was "a direct contract for the sale of milk" by it; that the League was not in and of itself a producer. In addition, counsel admitted that title to the milk passed to the association. The Court concluded that in view of the character of the League, its method of doing business, and the pro-

vision of the statute alluded to, that the defendant dealer was not buying milk or cream from producers and was, therefore, not subject to the licensing provisions of the Agriculture and Markets law.

Thus, the case turned, not on the relationship of the co-operative association there involved to its farmer-members, under the marketing contract existing between them, but on the particular method of doing business and the technical language of a statute making the association's contracts with third parties, the association's obligation. Here no similar statute is involved.

It is submitted that the Court below should more properly have applied the decision of the same New York Court in *Pyrke, etc.* v. *Bruduo, supra*, than the decision in the *Shoemaker* case, *supra*, for the reason that in the *Brudno* case, the Court directly passed upon the marketing contract between the same Dairymen's League Co-operative Association and its farmer-members and held such contract to be one of agency and not of purchase and sale and distinguished the case, justifiably, we submit, from the *Shoemaker* case on the facts involved.

*3. The fact that petitioner-association, in the marketing contract between it and its farmer-members guarantees its farmer-members against loss in the disposal of their milk in no wise changes the relationship of consignment to sale.*

In reaching its decision, the Court below placed considerable emphasis on the fact that under the marketing contract, the petitioner-association guarantees payment to its farmer-members for their milk consigned to and agreed to be disposed of by petitioner-association. (R. 161.)

To hold this contract stipulation inconsistent with the creation of the relationship of principal and agent or consignor and consignee and as an important factor in construing the marketing contract as a sales contract, is contrary, we submit, to the decision of this Court in *Ludvigh,*

*Trustee in Bankruptcy of Horowitz* v. *American Woolen Company of New York*, 231 U. S. 522, 58 L. ed. 345, 34 S. Ct. 161. *Vide*, also: *In re Renfro-Wadenstein et al.*, (C. C. A.) 53 Fed. (2nd) 834, affirming with modifications, *Same*, 47 Fed. (2nd) 238, 244.

The net effect of the contract stipulation whereby the association guaranteed payment to its farmer-members for their milk delivered pursuant to the marketing contract, was simply to make of petitioner-association a *del credere* agent or factor, 25 *Corpus Juris*, 343; 22 *Am. Jur.*, 309, et seq.

**C. Petitioner-Association Neither Carried on a Business for Gain or Economic Benefit, Nor Was it Engaged in Business in the District of Columbia, Within the Intendment of Title 20, Supp. III, Sections 970 to 970(15) Inclusive, and Sections 752, et seq., Code of the District of Columbia, 1929, so as to Render it Liable for Taxation in the Manner Adjudged by the Court Below.**

*1. The Act of Congress imposing a tax on the privilege of carrying on or exercising, for gain or economic benefit, any business in the District does not embrace petitioner-association within the class subject to said tax.*

To contend, as the Court below held, that petitioner-association is a corporation or association, carrying on a business for gain or economic benefit within the District of Columbia, does violence not only to the express language of the statute imposing the tax on such activity, but to the purpose and objective of petitioner-association as reflected in Section 419 of the Maryland Code (Appendix "B", Petioner's Supporting Brief, p. 38), made a part of its by-laws (R. 24, 86), its by-laws and the marketing contract between it and its farmer-members.

The character of petitioner-association as a non-stock, non-profit cooperative association, organized for the mutual benefit of its farmer-members within the letter and spirit of the Cooperative Associations law of the State of Mary-

land and the method of its operation each distinguish it from the type of business that it was the intent of Congress to reach in the enactment of the "business privilege tax law" (Title 20, Supp. III, to the Code of the District of Columbia, 1929, Sections 970 to 970 (15), inclusive.)

Certainly it was not so engaged by virtue of the limited transactions wherein it secured milk from others than farmer-members in order to supply distributors' needs (R. 99), for here again no gain or profit inured to the benefit of the corporation. This necessary operation of petitioner-association was but incidental to its main purpose and in aid of that purpose, namely, to market its farmer-members' milk at cost on a cooperative basis. This incidental operation would not have denied it exemption from payment of federal income taxes on corporations under Section 101 (12), Internal Revenue Code, 1939. *Eugenia Fruit Growers Association* v. *Commissioner,* 37 B. T. A. Reports 993.

"There is no 'profit' as such to the legal entity—the association. There are no dividends in the ordinary sense, but merely remittances to members on a pro-rated basis of any accumulated funds on hand in excess of operating costs and necessary or legally required reserves."[4] That quotation from the text cited sums up the fact that while the "profit incentive is the mainspring of commerce, * * * [it] is the antithesis of co-operation." *Tobacco Growers' Co-op. Ass'n.* v. *Jones* 185 N. C. 265, 117 S. E. 174, 182, quoting 23 Col. L. R. 91, 111.

"* * * the association not only was the creature of the growers, but by its charter it had no right to make a profit out of the handling or sale of their products. The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its mem-

[4] *The Law of Cooperative Marketing,* Evans and Stokdyk. The Lawyers Co-operative Publishing Company, Rochester, New York, 1937, p. 31.

bers * * *." *City of Owensboro et al.* v. *Dark Tobacco Growers' Ass'n.*, 222 Ky. 164, 300 S. W. 350, 352, holding agricultural products in the hands of the producer or his agent exempt from taxation and that the contract between association and member was an agency contract.

Petitioner-association under the facts, we submit, fits, in all respects, these concepts of agricultural cooperation, and is not a corporation carrying on a business for gain or economic benefit in the District of Columbia.

The statute here in question does not impose the tax on the privilege of doing business in the District on a business corporation, but rather, a corporation engaged in business for "gain or economic benefit".

In *Connecticut Valley Tobacco Ass'n. Inc.* v. *Inhabitants of Town of Agawam*, 261 Mass. 110, 158 N. E. 506, it was held that while a foreign corporation, organized as a cooperative association without capital stock was subject to an *ad valorem* property tax on tobacco stored in its warehouse within the State of Massachusetts, yet it was not subject to an excise tax, in the nature of a business privilege tax, for the reason that "it has no capital stock, and no corporate excess or net income on which an excise may be laid" under the statute imposing the tax.

And the Supreme Court of Kansas in *Kansas Wheat Growers' Ass'n.* v. *Board of Commissioners of Sedgwick County et al.*, 119 Kan. 877, 241 P. 466, under a tax statute which required a corporation to pay taxes on any property which it owns or holds subject to its control within the state and which is purchased by it with a view of being sold at an advanced price or profit, or which has been consigned to it for the purpose of being sold, held that a non-profit cooperative association was not a merchant within the meaning of the taxing statute and not subject to taxes on account of holding wheat grown by its members.

Unlike the mercantile license tax held applicable to a cooperative purchasing association in *Appeal of Beaver County Co-op. Ass'n.*, 118 Pa. Super. 305, 180 A. 98, where

the practice of buying to sell again and to non-members constituted the association a dealer within the meaning of that term as used in the taxing statute, the "business privilege tax act", is directed to a business operated for gain or economic benefit.

These decisions, it is submitted, while in nowise binding on this Court, give an insight into the construction other courts have placed upon precise definitions in other, and sometimes, similar statutes to the one here involved. At the risk of being too detailed, *amicus curiae*, cites them in support of the contention that petitioner-association, as a corporate entity, does not come within the purview of the "business privilege tax act".

Further, it is difficult to reconcile the decision of the Court below in this regard to the language of this Court in *Frost* v. *Corporation Commission*, *supra*, p. 523, 524, wherein a distinction was made between the types of corporations authorized under two different statutes of the State of Oklahoma. Under one, the corporation became subject to certain state licensing provisions on cotton gins, while a corporation organized under the other, was not so subjected. The distinction there recognized was based upon the non-profit, mutual character of the latter type corporation and this Court was of the opinion that as to such non-profit cooperative association, the apparent discrimination in the licensing law would be valid.

It is submitted that petitioner-association is beyond the pale of the "business privilege tax act" as a corporation engaged in business for gain or economic benefit; that to hold it subject to the tax does violence to the express language of the Act as well as the purpose and objective of petitioner-association's corporate existence as reflected by its by-laws and marketing contract.

*a. Under no circumstance was petitioner-association liable to taxation under said Act except for the commissions or brokerage deductible by it under the terms of the marketing contract.*

Section 970 (5), Title 20, Supp. III, to the Code of the District of Columbia, 1929, in force at the time, provided: "* * * the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

As Chief Justice Groner pointed out in his dissenting opinion to the majority opinion below (R. 167)—"* * * the gross proceeds of *all milk* sold for members in the year in question is not the basis on which taxes for license purposes may be assessed as 'gross proceeds of operation'. * * * this is obvious from the language of the business privilege tax section in which it is expressly provided that the license tax shall be computed and payable only, in the case of a broker or agent, upon gross commissions and shall not be taxable or payable upon funds of the principal of which the agent is the mere conduit * * *"

If, as we contend, petitioner-association was acting at all times as the agent of its farmer-members in respect to the marketing of their milk and in the collection and disbursement of the proceeds of the sale thereof then, in any event, if assumed to be within the provisions of the Act in question, it is only within the law as it relates to agents and the measure of its tax liability would be its "gross brokerage" and not gross receipts derived from the sale of all of its farmer-members' milk. The holding of the Court below is believed to be contrary to the express provisions of the Act in question providing for the assessment of the business privilege tax, in the case of an agent or broker, on gross commissions.

*2. The Act of Congress which imposes a personal property tax only on the moneys and credits, etc., of any association or corporation resident of or engaged in business within the District of Columbia does not embrace the properties taxed as the Court below held.*

The Court below held that petitioner-association had established a commercial domicile in the District of Columbia and was engaged in business there. (R. 160.) The petitioner waived any doubt in favor of the taxing authorities of the District and paid the *ad valorem* tax on property having a physical situs in the District, namely, bank deposits, other intangibles and tangible personal property. (R. 6, 7.) Whether it was liable to do so is not in question here.

Since, as we believe and as Chief Justice Groner pointed out in his dissent, petitioner-association at all times acted as agent for its farmer-members, it had no moneys, credits, etc., belonging to it as a corporate entity subject to taxation under said statute (Title 20, Part V, Sections 752, et seq., Code of the District of Columbia, 1929), irrespective of whether it had established a commercial domicile or was engaged in business in the District of Columbia within the meaning of the terms "resident" or "engaged in business" as used in the taxing statute in question.

## II.

### A. The Fifth Amendment to the Constitution and Clause 3, Section 8 of Article I Inhibits the Application of Title 20, Part V, Section 752, et seq., and Title 20, Supp. III, Sections 970 to 970(15), Incl., Code of the District of Columbia, 1929 to Petitioner-Association in the Manner Held by the Court Below.

*1. The extra-territorial application given these statutes by the Court below to petitioner-association is in direct conflict with the 5th Amendment to the Constitution.*

The Court below held that "as the taxes here in question were imposed by Congress, cases holding state taxation invalid as in derogation of the power of Congress are not in point. Various contentions of petitioner with regard to the validity of tax legislation for the District of Columbia are met by *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246." (R. 164.)

Since the expression of the Court below quoted *supra*, appears generally applicable to contentions of petitioner below respecting both the ad valorem property tax and the business privilege tax, it is important to consider the reasoning of the United States Court of Appeals for the District of Columbia in the *Neild* case, *supra*.

That case involved the authority of Congress to impose an excise tax on one transacting business within the District of Columbia based upon gross sales of its property within the District. When challenged as constituting an unlawful burden on interstate commerce under the federal Constitution, the United States Court of Appeals for the District of Columbia took the position that Congress, in enacting the legislation, acted pursuant to Clause 17, Section 8, Article 1 of the Constitution and not in pursuance of its power to regulate commerce under Clause 3 of the same section and article, namely, the constitutional authorization to legislate for the District of Columbia. Parenthetically it stated that the legislation was entirely within con-

stitutional limits if it be regarded as an exercise of the congressional power under Clause 3, the commerce clause. The Court's theory as to the latter was that the commerce clause operates as a limitation solely upon the states and constitutes no bar to the action of Congress in any event. As to the legislation being an exercise of the power to legislate for the District, exclusive to Congress, the Court's theory was that it (Congress) possesses full and unlimited jurisdiction to provide for the general welfare of the citizens within the District by any and every act of legislation which it may deem conducive to that end; that when it legislates for the District, it acts as a legislature of national character exercising complete legislative control as contrasted with the limited power of a state legislature; that it may exercise within the District substantially the powers which the legislature of a state may exercise within the state, but it may also exercise general legislative powers as for example, the power granted by the commerce clause; that when it so acts it is free of the restraints which are imposed by the Constitution upon the states—250, 251 of 110 Fed. (2nd).

It may well be that when Congress exercises general legislative powers within the District, including the power granted by the commerce clause, it is free of the restraints which are imposed upon the states by the Constitution. But this is not to say that when Congress so acts it is unfettered by restraints imposed upon it, by other provisos of the same Constitution, namely, the 1st to the 10th Amendments to the Constitution. That it is subject to such restraints was held in, among other decisions, *Wight* v. *Davidson*, 181 U. S. 371, 384, 80 L. ed. 1402, 21 S. Ct. 960; *O'Donoghue* v. *United States*, 289 U. S. 516, 539, 542, 545-547, 77 L. ed. 1356, 53 S. Ct. 740; *United States* v. *Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 S. Ct. 368, 24 A. L. R. 992; See also: *United States* v. *Mattingly*, 52 App. D. C. 188, 285 Fed. 922, and see footnotes 9 and 10 to reported case of *Neild* v. *District of Columbia*, 71 App. D. C. 306, 110 Fed. (2nd) 246, 250; *Sims* v. *Rives*, 66 App. D. C. 24, 84 Fed.

(2nd) 871, certiorari denied, 298 U. S. 682, 80 L. ed. 1402, 56 S. Ct. 960.

Thus, the Congress, in respect to general legislation or when legislating for the District of Columbia is subject to the restraints, among others, of the 5th Amendment to the Constitution which inhibits the denial of due process and the taking of private property for public use without just compensation. Though the measure of restraint under the 5th Amendment is not as broad as the measure of restraint on the States under the Fourteenth Amendment, nevertheless the restraint is there and an Act of Congress if gross enough, may be sufficiently discriminatory as to be "equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Stewart Machine Co.* v. *Davis*, 301 U. S. 548, 585, 81 L. ed. 1279, 57 S. Ct. 883, 109 A. L. R. 1293; *Heiner* v. *Donnan*, 285 U. S. 314, 326, 76 L. ed. 772, 52 S. Ct. 358, 361; *Coolidge* v. *Long*, 282 U. S. 582, 596, 75 L. ed. 562, 51 S. Ct. 306; *Nichols* v. *Coolidge*, 274 U. S. 531, 542, 71 L. ed. 1184, 47 S. Ct. 710; *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24-25, 60 L. ed. 493, 36 S. Ct. 236; *First National Bank of Boston* v. *Comm. of Int. Rev.* (C. C. A.) 63 Fed. (2nd) 685, 692; *Wight* v. *Davidson*, *supra*, pp. 384-387.

While decisions of this Court striking down state taxing statutes as in derogation of the 14th Amendment to the Constitution, or the commerce clause, may not be strictly applicable to the case at bar, it is submitted, that the principles announced in those decisions are generally applicable, except, perhaps, to the extent that those decisions turn on the "equal protection of the laws" clause of the 14th Amendment. Independent of those decisions, however, an Act of Congress may be palpably unconstitutional by virtue of constitutional restraints which do apply to it and the test is frequently the same as that applied to state enactments under the 14th Amendment. "The restraint imposed upon legislation by the due process clauses of the two [5th and 14th] amendments is the same." *Heiner* v. *Donnan, supra*, p. 326.

*2. It is not beyond comprehension that constitutional restraints encompass Acts of Congress, when legislating for the District of Columbia, which burden commerce emanating from within-out, of, or without-in to, the District of Columbia.*

This proposition, we believe, has never been passed upon directly by this Court, although it was alluded to and passed over in *Stoutenberg* v. *Hennick*, 129 U. S. 141, 148, 32 L. ed. 637, 9 S. Ct. 256, but it was there said at p. 147-148:

> "The act of the Legislative Assembly under which Hennick was convicted * * * was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noscitur a socias*, if the clause be taken as it should be, in connection with the other clauses and parts of the act. *But it is indistinguishable from that held void* in Robbins v. Shelby Taxing District, 120 U. S. 489, and Asher v. Texas, 128 U. S. 129, *as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District.* (Italics supplied)
>
> "* * * The business * * * falls * * * within the domain of the great distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality.
>
> "It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question solely for the District of Columbia, because whenever Congress acts upon the subject, the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point."

*Cf. Washington, Alexandria and Mt. Vernon Railway Co.* v. *Downey*, 236 U. S. 190, 59 L. ed. 533, 35 S. Ct. 406, dismissing appeal, *Same*, 40 App. D. C. 147.

*The question is of such peculiar significance in the case at bar that your amicus curiae feels that it should be passed upon directly by this Court.*

If "the power of Congress legislating as a local legislature for the District, to levy taxes for District purposes only, [is limited] in like manner as the legislature of a state may tax the people of a state for state purposes * * *" *Gibbons* v. *District of Columbia*, 116 U. S. 404, 407, 29 L. ed. 680, 6 S. Ct. 427; *Loughborough* v. *Blake*, 5 Wheat. 317, 318, 5 L. ed. 98; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690, 24 L. ed. 1098, *a fortiori*, when so acting, it is limited by similar constitutional restraints in burdening interstate commerce, as are the states.

3. *Whether the statutes in question be challenged as violative of the 5th Amendment or the commerce clause, their application by the Court below is contrary to the prior decisions of this Court in Stoutenberg* v. *Hennick, 129 U. S. 141, and Cohens* v. *Virginia, 19 U. S. (6 Wheat.) 264, 5 L. ed. 257, and the prior decision of the Court below in Beitzell* v. *District of Columbia, 21 App. D. C. 49.*

If, as the Court below held in *Neild* v. *District of Columbia, supra*, reiterated in its decision in this case (R. 164), Congress, in enacting the act imposing a tax on the privilege of doing business in the District was exercising the power to legislate for the District of Columbia, then the effect of its ruling in the instant case is believed to be contrary to the decisions of this Court in *Cohens* v. *Virginia, supra; Stoutenberg* v. *Hennick, supra,* and contrary likewise to its own decision in *Beitzell* v. *District of Columbia, supra*, in which latter case the rule announced by the Court was held improperly applied by the Court below in *Colgate Palmolive Peet Co.* v. *District of Columbia*, App. D. C., 110 Fed. (2nd) 264, 265.

By applying the rule of the *Neild* case to all of the contentions of the petitioner below in respect to the constitu-

tional validity of these taxing statutes, we submit, that the effect of its ruling as to the ad valorem property tax and the business privilege tax alike is contrary to the above cited decisions.

If the holding of the Court below be not contrary to these decisions then the Acts here brought into question cannot have the extra-territorial effect which the Court gave to them. If the intention of Congress as expressed in these statutes, on the other hand, is that they should have the extra-territorial effect given to them by the Court below, then, it is submitted, both statutes are contrary to the inhibitions of the Constitution as expressed in the 5th Amendment and Article 1, Section 8, Clause 3 of the Constitution.

On the theory that the Congress was legislating locally for the District of Columbia in the enactment of the statutes here in question, the application of those statutes by the Court below is contrary to the pronouncements of this Court in the following, among other decisions, and each of which admittedly involved state statutes and their test of constitutionality under the commerce clause and 14th Amendment of the Constitution, viz., *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203, 69 L. ed. 916, 45 S. Ct. 477; *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913; *Safe Deposit and Trust Company of Baltimore* v. *Commonwealth of Virginia*, 280 U. S. 83, 74 L. ed. 180, 50 S. Ct. 59; *Union Refrigerator Transit Co.* v. *Commonwealth of Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 S. Ct. 36; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 S. Ct. 628; *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 S. Ct. 576; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 9 S. Ct. 1; *State Tax on Foreign Held Bonds*, 82 U. S. (15 Wall.) 300, 21 L. ed. 179.

We do not believe that the restraints imposed upon the state government, in its sphere, or the federal government in its sphere, by the same Constitution, were intended to apply with less rigidity in the latter instance, when Congress is legislating locally for the District, than to the for-

mer when a state legislature is legislating for the state.

The Court below having determined that the revolving fund and the accounts receivable from dealers were the property of petitioner-association and not its farmer-members, then conclude that these items were taxable as the property of petitioner-association, though a foreign corporation, on the basis of its having established a "commercial domicile" in the District of Columbia, and was engaged in business there,—relying on the decision of this Court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 208-211, 80 L. ed. 1143, 56 S. Ct. 773, and on its own prior decision in *Hazen* v. *National Rifle Association of America, Inc.*, 69 App. D. C. 339, 101 Fed. (2nd) 432.

In the *Wheeling* case, *supra*, however, no similar questions were presented as were here and which are drawn into question by the Petition for Writ of Certiorari, namely, (1) Is petitioner-association a proprietary corporation engaged, as such, in business in the District of Columbia and has, therefore, a commercial domicile in the District within the purview of Title 20, Part V, Section 752, et seq., Code of the District of Columbia, 1929 and (2) was it the owner of the property sought to be taxed by the District of Columbia under the cited statute?

The Court below so held and it is upon the correctness of that holding that the possible application of *Wheeling Steel Corporation* v. *Fox, supra*, rests.

That the bulk of the securities subjected to taxation and comprising a part of the revolving fund had a physical situs outside the District of Columbia is clear from the record (R. 4, 5, 59, et seq.). Therefore, to hold such securities taxable by the District of Columbia, the Court below, in view of its determination that petitioner-association was the owner of them, applied the rule that intangibles may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. This it did to answer the contention that petitioner-association in any event was a foreign corporation. *Wheeling Steel Corporation* v. *Fox, supra*, p. 211; *Farmers Loan*

*and Trust Co.* v. *Minn.*, 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98.

It is submitted that there is no basis in the instant case to apply this recognized exception to the rule of *mobilia sequuntur personam*. These securities were not property within the District of Columbia. Hence, they had no legal situs for taxation by District taxing authorities, being owned by non-residents and being located outside the geographical boundaries of the District. *Safe Deposit and Trust Company* v. *Virginia*, 280 U. S. 83, 81, 74 L. ed. 180, 50 S. Ct. 59. Assuming that such intangibles may be properly taxed at the domicile of their owners there "is no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles * * *" *Farmers Loan and Trust Company* v. *Minnesota, supra*, p. 212. The case of *Wheeling Steel Corporation* v. *Fox, supra*, is not in point.

Nor, do we believe the accounts receivable from dealers, had a taxable situs in the District. They constitute debts, as we contend, owing to the farmer-members of petitioner-association and collectible by it as their agent. They did not, as the Board of Tax Appeals found, arise out of, and were necessarily used as an integral part of the business of the Association. (R. 64.) Such indebtedness did not have its origin in the course of business conducted by the corporate entity in the District of Columbia. These obligations of dealers to pay for milk delivered by its members do not represent returns to the corporate entity on any business it conducted in the District of Columbia. We believe the applicable rule is that announced in the decisions of this Court, admittedly later qualified, in *State Tax on Foreign-Held Bonds*, 82 U. S. (15 Wall.) 300, 320, 21 L. ed. 179; as restated in *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498, 25 L. ed. 558; quoted with approval in *Blodgett* v. *Silberman*, 277 U. S. 1, 15, 72 L. ed. 749, 48 S. Ct. 410, to the effect that "all the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be.

Their debts can have no locality separate and apart from the parties to whom they are due." See, also: *Farmers' Loan and Trust Co.* v. *Minnesota, supra*, pp. 212, 213.

For the sake of as much brevity as possible other questions presented by the Petition for Writ of Certiorari, being fully treated therein and in Petitioner's Supporting Brief, are not considered herein by *amicus curiae*.

## CONCLUSION.

Your *amicus curiae* is here by sufferance of this Court and the parties to this cause. It submits that the express holdings of the Court below and the implications to which that decision may lead, if permitted to stand, creates many uncertainties as to the legal status of farmers' cooperative associations. As a Federation of such associations, it is vitally interested in preserving the legal concept of agricultural cooperation expressed in the statutes of the United States and the several states. It believes that concept to be endangered by the decision below. And, aside and apart, from that question, here presented, it believes that the application of the taxing statutes involved is repugnant to certain constitutional guarantees and the prior decisions of this Court applying those guarantees to particular statutes and circumstances. Your *amicus curiae* submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, should be granted.

Respectfully submitted,

CHARLES W. WILSON,
*Attorney for Amicus Curiae.*

July 17, 1941.

## APPENDIX "A."

STATUTES INVOLVED.

Title 20, Part V, Code of the District of Columbia, 1929, provides in part as follows:

> "Section 752. All personal property in the District * * * subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money."
>
> "Section 754. On all tangible personal property * * * there shall be paid to the collector of taxes of the District of Columbia the rate of tax fixed in accordance with section 681 of this title.
>
> The moneys and credits * * * of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by section 753 of this title for listing and appraisal of tangible personal property and assessed at their fair cash value and as taxes on said moneys and credits there shall be paid to the tax collector of said District not less than five-tenths of 1 per centum of the value thereof * * *."

Title 20, Supp. III, to the Code of the District of Columbia, 1929, Sections 970 to 970 (15) inclusive provide in part as follows:

> "Section 970 (1) (d) The term 'business' shall include the carrying on or exercising for gain or economic benefit, either direct or indirect, any trade, business, profession, vocation, or commercial activity in or on privately owned property, and in or on property owned by the United States Government * * *, not including, however, labor or services rendered by any individual as an employee for wages, salary or commission."
>
> "Section 970 (1) (e) The term 'gross receipts' means the gross receipts received from any business in the District * * *, including cash, credits, and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials, labor, or services, or other costs, interest or discount paid, or any other expenses whatsoever * * *

*Provided further,* that in connection with commission merchants, attorneys or other agents, the term 'gross receipts' shall be deemed to mean the gross amount of such commissions or gross fees received by them, * * *'''

"Section 970 (2) No person shall engage in or carry on any business in the District * * * without first having obtained a license so to do from the Commissioners * * *."

"Section 970 (5) For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the collector of taxes of the District * * * a tax equal to two-fifths of 1 per centum of the gross receipts in excess of $2,000 derived from such business for the calendar year 1936: *Provided, however,* That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."